Supreme Court, U.S.
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No. 02-1373

In The
Supreme Court of the United States

MARIAN L. OLSON and IDA MAE BRUESKE,

Petitioners,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can land use laws create property rights protected under the Due Process Clause of the Fourteenth Amendment, and if so, which test should be used to determine the existence of such a property right?

2. Did the Colorado Supreme Court misapply the Due Process Clause by holding that Petitioners could be denied their rights under that Clause because of the existence of a remedy under state law?

RULE 29.6 STATEMENT

Hillside Community Church, S.B.C., a Colorado non-profit corporation, and the First Bank of Arvada, N.A. are both private corporations.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 58 P.3d 1021 (Colo. 2002). The Colorado Supreme Court Opinion appears at App. 3 through App. 23 of this *Petition*. The opinion of the Colorado Court of Appeals is reported at 42 P.3d 52 (Colo. App. 2001). App. 24-33. The *Findings of Fact, Conclusions of Law, and Judgment* of the District Court for the County of Jefferson, Colorado (the "District Court"), is unreported. It appears at App. 34 to App. 57. Petitioners, Marian L. Olson ("Olson") and Ida Mae Brueske, first raised their due process claims at trial by claiming a due process violation under 42 U.S.C. § 1983. Both the District Court and Colorado Court of Appeals held that Petitioners possessed a property right protected by due process. This result was overturned by the Colorado Supreme Court.

JURISDICTION

The Colorado Supreme Court Opinion was handed down on November 25, 2002. Petitioners sought a rehearing, which was denied on December 16, 2002. Jurisdiction in this Court is proper under 28 U.S.C. § 1257(a) and Sup. Ct. R. 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in part: "No state shall . . . deprive any

person of life, liberty, or property, without due process of law."

SUMMARY OF PETITION

This case involves the most basic and fundamental principle of due process protection, which heretofore has escaped definition by this Court: the definition of a property right. Most, but not all, federal circuit and state supreme courts recognize due process protections for property interests arising from land use regulations, but they have applied multiple standards, creating deep and longstanding divisions among federal circuit courts and state supreme courts.

Here, Olson owns property adjacent to a land parcel upon which the owner constructed a large addition to an existing building, thereby expanding a non-conforming use. This addition unquestionably violated numerous building code requirements, including height restrictions, and the construction project itself proceeded without the necessary city permits. Rather than enforcing its zoning laws, Respondent, the City of Golden (the "City"), violated them by issuing permits in direct contradiction of the City's laws and ordinances. Had the City followed its laws, it would have been prohibited from issuing the necessary building permits and certificates of occupancy.

Both the District Court and the Colorado Court of Appeals found that Olson had a protected property interest arising from the City's ordinances, and that the City denied Petitioners' due process by acting in clear contravention of its laws. However, the Colorado Supreme Court

reversed, finding that Petitioners had no protected property interest.

The Colorado Supreme Court's opinion squarely confronts two issues that have been the subject of substantial analysis and disagreement among both the federal circuit courts and the several state supreme courts. The first issue is whether land use laws give rise to property interests protected by due process. There are at least three separate approaches to this issue, but the majority approach focuses on whether the zoning laws in question restrict a regulatory body's discretion to reach a particular outcome. In the decision below, the Colorado Supreme Court facially accepted this majority approach.

The second issue before this Court is how severely agency discretion must be constrained before a court will find a legitimate claim of entitlement. Again there is a division among federal circuits, with five of seven federal circuits requiring substantial – but not absolute – limitations on governmental discretion. Only the Second and Tenth Circuits restrict due process protection of property interests by refusing protection if the agency has any discretion whatsoever. In the case at hand, the Colorado Supreme Court appears to have joined this isolated minority.

This is an important case for this Court to decide. Many federal circuits recognize that the circuit and state courts disagree on whether the Fourteenth Amendment protects property in the land use context, and they also recognize that this Court has yet to provide guidance in this area. The volume of litigation has increased substantially in the past decade, and these issues affect land use

property rights for nearly every property owner nationwide. This Court should therefore take this opportunity to determine what constitutes a property right in the land use context.

STATEMENT OF THE CASE

This case stems from the City's ratification of an illegal construction project, in direct contravention of the City's ordinances and regulations. This project occurred adjacent to Olson's home, directly affecting the use and enjoyment of her property, and denying her the protections afforded by the City's clear and long-standing zoning and building ordinances.

In Spring 1997, Hillside Community Church, S.B.C. ("Hillside") began building an addition to an existing church. The initial construction phase required extensive grading and soil movement. Because Hillside did not develop a plan to mitigate fugitive dust (in violation of the City's codes), the project created a dust nuisance that denied Olson the use of her backyard. Olson complained to the City and soon discovered that Hillside had never applied for, or received, a permit for any grading, soil movement, or construction. At that time, the City took no action against Hillside, and instead, the City granted Hillside's application for a "Foundation Only" permit. As the District Court found, these actions by the City clearly violated applicable City codes and ordinances.

Hillside continued its foundation work, but it ignored the permit limitations. Although the permit allowed a foundation only, Hillside built a large structure immediately adjacent to Olson's home. In doing so, Hillside

ignored the City's requirements to obtain a special use permit and a building permit. In addition, the construction project itself violated numerous zoning and building safety ordinances, including regulations governing grading, drainage, erosion control, retaining walls, parking, irrigation, fencing, height limitations, dust control, trash disposal, and occupancy requirements.

Again, Olson lived directly next to the Hillside construction project, and virtually all of Hillside's violations directly and seriously harmed her use and enjoyment of her own property. For example, Olson moved into her basement and kept windows closed to avoid the dust, sounds, and smells created by the project. Likewise, Hillside's project obstructed and dominated Olson's view from her home, in part because the project exceeded maximum height limitations. Olson continued to complain about the City's and Hillside's illegal activities, as well as the resulting impact on her property. Because the City simply ratified Hillside's violations, Olson ultimately instituted a lawsuit against the City and Hillside alleging, among other things, a denial of due process under the United States Constitution.

At trial, the District Court found that the City violated the mandates contained in numerous City ordinances, particularly when the City issued two building permits and a certificate of occupancy. The City's actions were held illegal because: (1) zoning regulations prohibited Hillside from expanding in the applicable zone district; (2) Hillside had not obtained a special use permit; (3) Hillside's construction exceeded the City's legal height limitation; (4) Hillside did not provide a site plan; (5) Hillside failed to provide mandated bicycle parking; (6) Hillside did not install a required irrigation system; (7) Hillside's

grading was too steep for code; (8) Hillside used improper fill material; (9) Hillside did not submit a required sediment and erosion control plan; and (10) Hillside's retaining walls had not been designed or approved by a structural engineer. App. 37-43. All of these activities occurred within feet of Olson's home.

The District Court expressly held that Olson had a property right protected by the Due Process Clause. App. 51. According to the District Court: "Thus, it is clear that Plaintiffs have a constitutionally protected property interest to see that local zoning and planning ordinances are followed, where non-compliance affects their property." App. 52. The District Court awarded attorney's fees under 42 U.S.C. § 1988, but refused to order Hillside to modify its development.

The Colorado Court of Appeals affirmed that Olson had a property right under the City ordinances at issue and the award of attorney's fees under 42 U.S.C. § 1988. App. 27. According to the Court of Appeals, "plaintiffs have a legitimate claim of entitlement arising from the [City's ordinances], which requires Hillside to obtain a special use permit." The Court of Appeals reversed the District Court concerning Olson's request for mandatory relief and held that "on remand the trial court must require Hillside to modify the church addition to comply with existing GMC ordinances." App. 31.

The Colorado Supreme Court reversed the Colorado Court of Appeals, holding that Olson did not have a "property right" warranting due process protection. Although internally inconsistent, the Colorado Supreme Court's analysis centered on two essential holdings. First, the Colorado Supreme Court held that the state laws at

issue afforded Olson only "procedural" protections and, in reliance on a minority view, that state law procedural rights could not give rise to a property right for due process purposes. App. 8-9.

Second, the Colorado Supreme Court held that the City ordinances at issue afforded "significant" discretion to the City's Planning Commission. The Colorado Supreme Court found such "significant" discretion in the following language:

> The Planning Commission shall hold a public hearing on the special use permit application, and upon conclusion of the public hearing, make a determination of approval, approval with limitations or conditions, or denial of the special use permit.

App. 16 (citations and quotations omitted). The Colorado Supreme Court held: "This language clearly indicates that the Planning Commission has significant – if not unlimited – discretion – discretion to rule on a special use permit application ***in whatever manner it deems appropriate***." *Id.* (emphasis added.)

The Colorado Supreme Court, nonetheless, acknowledged that another section of the ordinance "arguably limit[ed]" the Planning Commission's discretion, because (1) "special use permits shall be granted ***only if*** the usage will not authorize or require any construction or alteration in violation of any ordinances of the city, including the planning and zoning ordinance and the city building code" (emphasis added), and (2) the District Court found "some twelve specific code and ordinance violations." *Id.* The Colorado Supreme Court also acknowledged that these violations gave "some merit" to Olson's argument that she

had a "certainty or strong likelihood" that Hillside would be denied a special use permit. *Id.* However, the Colorado Supreme Court held that the "significant discretion" that it found to exist (see above) negated the mandatory language requiring denial of a special use permit.[1] App. 17.

The Colorado Supreme court also held that Olson had no rights under the Due Process Clause because she had access to certain state administrative procedures. The procedures, according to the Colorado Supreme Court, gave her an "adequate state remedy."

REASONS FOR GRANTING THE WRIT

I. FEDERAL CIRCUIT COURTS AND OTHER STATE SUPREME COURTS DISAGREE WHETHER PROPERTY INTERESTS ARISING AS A RESULT OF LAND USE REGULATION SHOULD RECEIVE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT

This case offers a vehicle for this Court to clarify the types of land use property interests that receive due process protection. A clear standard for land use property interests is the fundamental building block for determining the scope of all due process protection. Although much of the discussion of land use property interests in the due

[1] Totally ignored by the Colorado Supreme Court were mandatory provisions of the City's zoning ordinance and building code which precluded the issuance of a building permit and certificate of occupancy to Hillside. *See* Section 18.08.030 of the Golden Municipal Code and Section 109.3 of the City's Uniform Building Code. App. 37-38, 41.

process context centers on substantive due process, this *Petition* does not seek clarification of substantive or procedural due process contours. Rather, Olson seeks a definition of property interests that will guide the federal circuit courts and state supreme courts as they address future cases dealing with procedural and substantive due process issues.

Most, but not all, circuit courts have found that property rights stemming from land use regulations are protected by due process. And there is a similar division among several state supreme courts. Among those courts that recognize due process protections, there are two approaches: (1) the Third Circuit, along with the Delaware and Oklahoma state supreme courts, have found ownership of a property interest to be sufficient for due process protections; and, (2) several circuits will find a property interest if the governmental agency has little or no discretion to deviate from a particular outcome. In addition to this division among courts recognizing property interests, there is disagreement about whether property owners have a protected property interest in land use laws affecting adjacent property.

A. Courts That Reject Due Process Protection for Land Use Property Interests.

The First, Fifth, and Seventh Circuits refuse to find a land use property interest that may receive due process protections, and these circuits generally defer to what they characterize as political disputes. *Stewart Wiener*, SUBSTANTIVE DUE PROCESS IN THE TWILIGHT ZONE: PROTECTING PROPERTY INTEREST FROM ARBITRARY LAND USE DECISIONS,

69 Temp. L. Rev. 1467, 1474 (1996). Each Circuit's approach follows:

First Circuit. In *Licarri v. Feruzzi*, 22 F.3d 344 (1st Cir. 1994), the court repeated its consistent position that "rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process." *Id.* at 349-350. Although holding out the possibility for a substantive due process claim in "truly horrendous situations" the court avoided application in this instance because it would involve federal judges in areas traditionally reserved for local officials and courts. *Id.*

Fifth Circuit. In *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986), the Fifth Circuit held that, for due process challenges, zoning decisions are to be reviewed by the same constitutional standards used to review statutes enacted by state legislatures. *Id.* at 479. Accordingly, the Fifth Circuit would require that any action have no rational basis. *See also Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1075 (5th Cir. 1989) (city moratorium was a legislative act that did not give rise to procedural due process claim).

Seventh Circuit. While recognizing the confusion among circuit courts, and while acknowledging the possibility of a due process claim in the context of land use decisions, the Seventh Circuit has nonetheless rejected "[z]oning classifications [as] the measure of the property interest" but rather classified them as restrictions on the use of property only. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994). *See also New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910

F.2d 1474, 1480-1481 (7th Cir. 1990) (complaint failed to allege the violation of a constitutional interest).

B. Courts That Accept Due Process Protection Based on Ownership of Property.

There are two branches of opinion whereby courts accept land use property interests as a basis for due process protection. The more expansive view finds its most thorough expression in the Third Circuit. In *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), *cert. denied,* 516 U.S. 937 (1995), *rev'd on other grounds sub nom. United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 398-402 (3d Cir. 2003), the court found that "ownership of a property interest is worthy of substantive due process protections." 53 F.3d at 600-601; *United Artists Theatre Circuit, Inc.*, 316 F.2d at 398-402 (once property ownership has been shown, plaintiff must demonstrate that governmental action "shocked the conscience" rather than stemmed from improper motive). Thus, one must merely show the ownership of a property interest, such as here, Olson's ownership of property affected by the City's actions. Both Delaware and Oklahoma have adopted this ownership of property standard. *Dale v. Town of Elsmere*, 702 A.2d 1219, 1225 (Del. 1997) (court relied on *DeBlasio* analysis of property-owning plaintiff); *DuLaney v. Oklahoma State Department of Health*, 868 P.2d 676, 678 (Okla. 1994) (recognizing the impact of land use decisions on owners of affected property interests).

C. Courts That Accept Due Process Protection Where the Absence of Agency Discretion Creates a Legal Claim of Entitlement.

The more common view is represented by the Second, Fourth, Sixth, Eighth, Tenth, Eleventh and District of Columbia Circuits, all of which recognize that land use property rights are entitled to due process protections. Their common standard arises from *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) which held that one must show a legitimate claim of entitlement in order to assert a property interest receiving due process protections. *Id.* at 577-578. In general, this approach requires a plaintiff to show a legal claim of entitlement to a particular outcome in land use decisions. Accordingly, these courts look to the degree of discretion afforded the decision maker and will find a legal claim of entitlement (and thus a protected property interest) if the decision maker exercises no, or little, discretion. *George Washington University v. District of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003). The Colorado Supreme Court's opinion below ostensibly falls into this camp, although the plain language of the ordinances at issue patently shows that the Colorado Supreme Court erred in its analysis. Each circuit is discussed below:

Second Circuit. Extensive case law in the Second Circuit holds that "a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985). Since *Yale* was decided, other decisions have repeated this formulation: *Brady v. Town of Colchester*, 863 F.2d 205, 212-213

(2d Cir. 1988); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994); *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995), *cert. denied, Town of Smithtown v. Walz*, 515 U.S. 1131 (1995); *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999); and *Harlan Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001).

Fourth Circuit. The Fourth Circuit has found that due process will protect "a cognizable property interest . . . when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (citations omitted). *See also Scott v. Greenville County*, 716 F.2d 1409, 1415 (4th Cir. 1983) (authorities lacked all discretion to deny permit).

Sixth Circuit. This circuit also recognizes due process protections of property in the land use context, and its most thorough discussion appears in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217-1223 (6th Cir. 1992). The test is similar to that of other majority circuits – the plaintiff must first "establish the existence of a constitutionally-protected property or liberty interest," which requires a showing that the governmental agency has little discretion to deny a particular use of the land. *Silver v. Franklin Township Board of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). *See also Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995), *cert. denied*, 516 U.S. 816 (1995); *Richardson v. Town of Brady*, 218 F.3d 508, 512-513 (6th Cir. 2000); *Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001).

Eighth Circuit. In *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997), the court found that "a claim to entitlement arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion." *Id.* at 1070.

Ninth Circuit. The Ninth Circuit has held that land use property interests are entitled to due process protection in *Parks v. Watson*, 716 F.2d 646, 656-657 (9th Cir. 1983). *See also Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 63-64 (9th Cir. 1994) (commission discretion as a basis for determining property right in gaming license application). Because this standard recognizes rights stemming strictly from legal procedures, it is a slightly different formulation than that used in other circuits. *See Fusco v. Connecticut*, 815 F.2d 201, 205-206 (2d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987) (rights of abutting landowners strictly procedural and do not give rise to protected property interest).

Tenth Circuit. Most recently, in *Crown Point I, LLC v. Intermountain Rural Electric Association*, 319 F.3d 1211 (10th Cir. 2003), the Tenth Circuit held that "when a party challenges a land use decision by a governing body on due process grounds, the proper inquiry is whether that body had limited discretion in granting or denying a particular zoning or use application." *Id.* at 1217; *accord Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1118 (10th Cir. 1991).

Eleventh Circuit. In *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989), the Eleventh Circuit adopted the Eighth Circuit's standards, but found that the municipality had discretion to deny a permit, thus defeating the

plaintiff's due process claims. But this standard has not been uniformly followed within the Eleventh Circuit. *See Sullivan Properties, Inc. v. City of Winter Springs*, 899 F. Supp. 587, 596 (M.D. Fla. 1995) (holding that land use disputes receive only procedural due process protection, not substantive due process protection).

District of Columbia Circuit. Following an extensive survey of existing circuit splits on this subject area, the District of Columbia Circuit firmly held that "new property interests," such as those arising from land use regulations, are recognizable for due process protections. *George Washington University*, 318 F.3d at 207.

State Supreme Courts. Both Connecticut, in *Grimes v. Conservation Commission of Town of Litchfield*, 703 A.2d 101, 107-108 (Conn. 1997), and Oklahoma, in *DuLaney*, 868 P.2d at 680-681, recognize due process protections of land use property interests.

D. Courts' Differing Treatment of Property Owners' Interests in Regulations Affecting Adjacent Property.

Although the majority view gives due process protection to land use property interests, there is nonetheless disagreement over whether a property owner may assert a protected interest in land use regulations affecting adjacent properties. Only a few courts have confronted this issue, but the weight of opinion holds that adjacent property owners ***do*** have protected property interests. In *Brody*, 250 F.3d at 438, the Sixth Circuit applied a due process analysis to the claim of adjacent property owners, and the Oklahoma Supreme Court recognized the impact of development on adjacent property owners to conclude

that adjacent landowners have due process rights in administrative proceedings. *DuLaney*, 868 P.2d at 680-681. The Connecticut Supreme Court also recognizes the rights of adjacent property owners, by applying the legitimate-claim-of-entitlement test to adjacent property owner claims. *Grimes*, 703 A.2d at 107-108. In the case at hand, the Colorado Supreme Court recognized that adjacent landowners receive the same protection as other landowners. *See* App. 15 n. 5.

Only the Second Circuit has explicitly rejected claims of abutting landowners. *Fusco*, 815 F.2d at 205-206 (rights of abutting landowners strictly procedural and do not give rise to protected property interest). The Delaware Supreme Court has held likewise. *Dale*, 702 A.2d at 1224-1225 ("Land-owning plaintiff" only is protected, and is limited to one who is an actual property owner).

II. FEDERAL CIRCUIT COURTS AND STATE SUPREME COURTS DISAGREE ABOUT HOW SEVERELY OFFICIAL DISCRETION MUST BE CONSTRAINED BEFORE ONE CAN ASSERT A LEGALLY PROTECTED PROPERTY RIGHT

Among those courts that have found a protected property interest for due process purposes, there is again a deep and longstanding division over the applicable standards. To determine a protected property interest, courts require the plaintiff to demonstrate a legitimate claim of entitlement, which is normally based on the level of discretion afforded governmental agencies. However, "[t]here is considerable variety in the courts' formulae for how severely official discretion must be constrained to establish a legitimate claim of entitlement." *George Washington University*, 318 F.3d at 207.

As noted earlier, much (but not all) of this discussion has occurred in the substantive due process area. This *Petition*, however, focuses on a division within the majority approach for determining a legal entitlement. Several courts state that if an agency has any discretion whatsoever, there is no property interest. Petitioners urge this Court, however, to recognize that a legitimate claim of entitlement exists when state law imposes substantial – but not absolute – constraints on governmental discretion.

A. Courts in Which a Legal Claim of Entitlement Requires Absolute Limitation on Governmental Discretion.

The majority view is that official discretion must be significantly – but not absolutely – constrained. Thus, in the Fourth Circuit, significant discretion conferred upon the local agency defeats the claim of a property interest. *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992). This standard is similar to that in the Sixth Circuit, *Triomphe Investors*, 494 F.3d at 202 (Plaintiff must possess either a legitimate claim of entitlement or a justifiable expectation), the Eighth Circuit, *Bituminous Materials*, 126 F.2d at 1070 (a property interest claim requires substantial limits on governmental exercise of its licensing discretion), the Ninth Circuit, *Parks*, 716 F.2d at 656-657 (if procedural requirements are intended to operate as a "significant substantive restriction" on the agency's actions, a property interest may be created), and the Eleventh Circuit, *Spence*, 873 F.2d at 258 (any significant discretion conferred upon the local agency defeats the claim of a property interest). Among state supreme courts, Minnesota relies on Eighth Circuit standards. *Northpointe Plaza v. City of Rochester*, 465

N.W.2d 686, 689 (Minn. 1991). Finally, the District of Columbia Circuit recently surveyed practices among different Circuits and chose to adopt the standards represented by the Eighth Circuit. *George Washington University*, 318 F.3d at 207.

B. Courts in Which a Legal Claim of Entitlement Requires Absolute Limitation on Governmental Discretion.

Opposed to the Fourth, Sixth, Eighth, Ninth and Eleventh Circuits are the Second and Tenth Circuits, the Supreme Court of Connecticut and now, apparently, the Supreme Court of Colorado, which require that governmental agency discretion be absolutely limited before they will find a legitimate claim of entitlement. This approach is in the small minority. The Second Circuit, in particular, applies a strict entitlement test in land use regulation, *Harlan Associates*, 273 F.3d at 503, whereby the outcome of any agency involvement must be assured, or when certainty is so strong that the outcome is "virtually assured." *Walz*, 46 F.3d at 168. Thus, if there is any uncertainty about the outcome – or even any uncertainty about the meaning of the law – then one cannot assert a legitimate claim of entitlement. *Natale*, 170 F.3d at 263; *accord*, *Gagliardi*, 18 F.3d at 193; *Brady*, 863 F.2d at 212-213; *RRI Realty Corp.*, 870 F.2d at 918.

Likewise, the Tenth Circuit requires a specific outcome before finding a legitimate claim of entitlement. *Crown Point*, 319 F.3d at 1217. Colorado and the Connecticut Supreme Court are the two state courts that have adopted this strict standard approach. *Grimes*, 703 A.2d at 104-105; *Double I Ltd. Partnership v. Plan and Zoning Commission*, 588 A.2d 624, 631 (Conn. 1991).

III. IT IS IMPORTANT THAT THIS COURT DEFINE A COMMON STANDARD DEFINING LAND USE PROPERTY INTERESTS IN THE DUE PROCESS CONTEXT

By identifying clear standards for land use property interests, this Court can settle the first question necessary to resolve all remaining due process issues – whether or not a property right exists in the first place. Further, this Court has yet to speak directly on any of the many disagreements confronting the circuit courts, and most of this country's circuit courts recognize the divisions, ambiguities, and need for clear standards regarding due process protection of land-use property interests. Indeed, the analysis discussed above draws heavily from comments and rulings from the circuit courts themselves. As recently as last month, the District of Columbia Circuit declared that "in the land-use context courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes." *George Washington University*, 318 F.2d at 206-207.

Such sentiments go back over a decade, beginning in 1989, when the Second Circuit declared that "Federal courts have followed a somewhat uneven course in explicating the rationale for and the extent to which the substantive component of the Due Process Clause of the Fourteenth Amendment protects landowners in disputes with local agencies empowered to limit the permissible uses of their property." *RRI Realty Corp.*, 870 F.2d at 914. Following an extensive survey of circuit court decisions in this area, the Sixth Circuit declared "the lack of uniformity among the circuits in dealing with zoning cases of the arbitrary and capricious substantive due process category is remarkable," *Pearson*, 961 F.2d at 1217, which was

echoed by *Jacobs, Visconsi & Jacobs*, 927 F.2d at 1120 n. 7 ("the courts are not uniform in their application of the arbitrary and capricious standard in zoning ordinance cases"). Finally, both the Seventh and Third Circuits have recognized the dearth of standards from this Court. *New Burnham Prairie Homes*, 910 F.2d at 1480 n. 5 ("it must be acknowledged frankly that the Supreme Court has yet to set the contours of any substantive due process right with respect to property interest"); *DeBlasio,* 53 F.3d at 598 (" . . . whether and when state-created property interests invoke substantive due process concerns has not been decided by the Supreme Court").

IV. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT OLSON DID NOT HAVE A PROPERTY RIGHT

The Colorado Supreme Court looked at language giving the City Planning Commission the power to make a ***decision*** and held that this language gave the Planning Commission "***significant discretion***," *see* App. 17, despite the fact that another section of the applicable City ordinance unequivocally required certain conditions to exist prior to the issuance of a permit. The Colorado Supreme Court tortured the language at issue to find "significant discretion" where the plain language of the ordinances at issue provides no such discretion. In short, the Colorado Supreme Court confused the duty to make decisions with the substantive criteria that guided the decisions.

While the highest court of a State should normally be afforded the final say in interpreting state law, this Court should not defer when the Colorado Supreme Court's opinion destroyed Olson's property rights, placing her at

the whim of "significant discretion" which directly led to substantial, real and personal deprivation related to the use and enjoyment of her property. This case affords a perfect vehicle for the Court to determine what constitutes a property right that deserves protection under the Due Process Clause.

V. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT OLSON'S STATE LAW REMEDY WAS ADEQUATE TO SATISFY HER CONSTITUTIONAL DUE PROCESS RIGHTS

The Colorado Supreme Court found that Olson "had an adequate remedy for [her] claims under state law, and therefore no basis upon which to seek recourse under § 1983." App. 4. A court, however, can only evaluate the adequacy of a remedy based upon the nature and extent of the due process violation, because due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner, for a hearing ***appropriate to the nature of the case***." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (citations omitted and emphasis added). Here, the Colorado Supreme Court did not find a due process violation, thus depriving it of any basis for evaluating the adequacy of Colorado's procedural remedies. For example, if Olson's due process rights were violated by the City Council's action, then the Colorado Supreme Court's analysis of a post-deprivation remedy simply does not apply to this intentional violation. *Logan*, 455 U.S. at 435-436. This Court should therefore affirm that a court must first evaluate the nature of the due process violation before evaluating the adequacy of a remedy.

CONCLUSION

The Court should grant this *Petition*.

Respectfully submitted,

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Colorado Supreme Court – November 25, 2002
Hillside Community Church, S.B.C. v. Olson; City of Golden v. Olson
SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203

Consolidated Cases Case No. 01SC808
Case No. 01SC878

Certiorari to the Colorado Court of Appeals
Court of Appeals case No. 99CA2070

Certiorari to the Colorado Court of Appeals
Court of Appeals No. 00CA0570

No. 01SC808

Petitioners:

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado Municipal Corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

v.

Respondents:

MARIAN L. OLSON AND IDA M. BRUESKE

No. 01SC878

Petitioners:

THE CITY OF GOLDEN, a Colorado Municipal Corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

v.

Respondents:

MARIAN L. OLSON AND IDA M. BRUESKE

JUDGMENT REVERSED
EN BANC
NOVEMBER 25, 2002

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JUSTICE RICE delivered the Opinion of the Court.

In this combined proceeding, we granted certiorari to determine whether the requirement in the Golden Municipal Code (GMC) that a public hearing be held before a special use permit is issued affords neighboring landowners a property right in the procedure warranting the protection of Fourteenth Amendment due process guarantees.[1]

The trial court held, and the court of appeals affirmed, that Respondents had a legitimate claim of entitlement to notice of, and participation in, a public hearing regarding a special use permit for Hillside Community Church's building addition. They concluded that this entitlement was a property right warranting procedural due process protection. Accordingly, because no public hearing was held as required by the GMC, both courts held that Respondents' due process rights were violated pursuant to their claim under 42 U.S.C. § 1983. In addition, because 42 U.S.C. § 1988 provides for an award of attorney fees to the prevailing party in a § 1983 claim, the court of appeals affirmed the trial court's grant of attorney fees to Respondents in a separate opinion.

We reverse. We hold that procedural guarantees stemming from state law or local ordinance do not create a constitutionally cognizable property interest. As such, they

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[1] We granted certiorari on the following issue: Whether the failure to conduct a public hearing on a landowner's application for a special use permit pursuant to a provision of a municipal code, which grants adjacent landowners the right to notice of and an opportunity to participate in such hearing, violates the adjacent landowners' procedural due process rights, even though adjacent landowners successfully sued for mandamus to remedy the mistake.

cannot be the basis of a meritorious § 1983 claim, and hence, the award of attorney fees to Respondents under section 1988 was improperly granted. We further conclude that Respondents had an adequate remedy for their claims under state law, and therefore no basis upon which to seek recourse under § 1983.

I. FACTS & PROCEDURAL HISTORY

This case arose from a dispute between the Hillside Community Church (Hillside) and Respondents Marian L. Olson and Ida M. Brueske, over the construction of an addition to the church. Respondents own and reside in homes adjacent to the church property in Golden, Colorado. In the spring of 1997, Hillside began construction activities on its property without investigating applicable planning and zoning requirements, and thus without obtaining a permit of any kind. Although Hillside belatedly obtained a "Foundation Only" permit in May of 1997, it subsequently exceeded the bounds of that permit by commencing construction on the addition itself. Petitioner, the City of Golden, eventually issued a building permit to Hillside in October of 1997.

In April of 1998, when the addition was substantially complete, Respondents asserted to the City of Golden that Hillside should have obtained a special use permit prior to construction, that the addition might be in violation of height limitations applicable to the R-1 zone district, and that other code provisions were being violated.

In May of 1998, the City Attorney for Golden agreed, determining that Hillside's building permit had been improperly granted because the church addition constituted an extension of a non-conforming use in the R-1 zone

district. Under the requirements of the GMC, the extension of a non-conforming use was precluded unless a special use permit had been obtained. The GMC further mandated that before a special use permit could be issued, a public hearing must be held and neighboring landowners given notice and an opportunity to participate. This had never occurred with regard to the church addition. Although acknowledging the mistake, the City Attorney did not require that a special use permit be obtained or a hearing held after the fact, because the addition was by then substantially complete. He also declined to revoke the building permit or require that the addition be modified or torn down, relying on the doctrine of relative hardship set forth in *Hargreaves v. Skrbina,* 662 P.2d 1078 (Colo.1983). In June, Hillside belatedly obtained a five-foot height variance. In November, the City issued a certificate of occupancy to Hillside for the addition.

In June of 1998, Respondents filed suit in the district court seeking injunctive relief and mandamus under C.R.C.P. 106(a)(2). They alleged six claims for relief,[2]

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[2] In addition to their claim under 42 U.S.C. § 1983, Respondents also alleged that: (1) Hillside had impaired their prescriptive right of access over and across the church property; (2) Hillside had violated numerous provisions of the GMC and the Uniform Building Code, entitling them to relief under C.R.C.P. §§ 106(a)(2) and 65(a); (3) the City of Golden had improperly granted Hillside a building permit and must accordingly direct the church to remove the addition; (4) the City Council had exceeded its jurisdiction and abused its discretion in granting the variance to Hillside; and (5) the City of Golden had violated the Establishment Clause of the First Amendment of the United States Constitution by giving preferential treatment to churches.

among them a violation of their rights under 42 U.S.C. § 1983. That statute states, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

42 U.S.C. § 1983 (2000). Specifically, Respondents claimed that because Golden had issued a building permit to Hillside without granting them an opportunity to participate in the special use permit hearing as mandated by the GMC, Respondents had been deprived of a property interest in violation of their due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

The trial court ordered the City to set aside the height variance, vacate the certificate of occupants occupancy, hold a hearing as required by the GMC pursuant to the issuance of a special use permit, and only reissue a certificate of occupancy upon approval of the special use permit and compliance with all other provisions of the GMC. Provided that the special use permit was ultimately granted, however, and finding that Hillside had relied in good faith on the assurances of the City, the court declined to order the church addition altered or removed, citing the doctrine of relative hardship. Finally, the trial court held that Respondents had a constitutionally protected property interest to see that local zoning and planning ordinances

are followed, where non-compliance affects their property." *Olson v. Hillside Cmty. Church,* No. 98CV1842, slip op. at 19 (Colo. Dist. Ct. 1999). Having thus concluded that Respondents had prevailed in their claim under 42 U.S.C. § 1983, the trial court ordered reasonable attorney fees awarded to them pursuant to 42 U.S.C. § 1988.

The court of appeals affirmed Respondents § 1983 claim, but reversed on the relative hardship doctrine. The court concluded that Hillside had not, in fact, acted in good faith, and hence should not be afforded the positive presumption of that doctrine. It accordingly reversed the trial court's ruling on that issue, and remanded to the trial court to require Hillside to modify the church addition to comply with existing GMC ordinances.[3] In affirming the Respondents' § 1983 claim, the court of appeals held that they had a "legitimate property interest arising from the GMC" and their "procedural due process rights were violated." *Olson v. Hillside Cmty. Church,* 42 P.3d 52, 55 (Colo. App. 2001). In a separate ruling, the court of appeals also upheld the award of attorney fees to Respondents under 42 U.S.C. § 1988. *Olson v. City of Golden,* No. 00CA0570, slip op. at 5 (Colo. App. Sept. 13, 2001).

Petitioners City of Golden and Hillside Community Church appealed the court of appeals' decisions to this court. We granted certiorari only with respect to the due

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[3] In its petition to this court, Hillside seeks the abandonment of that order because it maintains that compliance has been achieved during the pendency of the appeal to this court. We conclude that the determination of whether Hillside has complied with the court of appeals' order is an issue of fact which must ultimately be determined by the trial court. Accordingly, we decline to rule on that issue.

process issue. We thus address the question of whether Respondents had a legitimate property interest either in a right to special use hearing, or in their right to denial of a special use permit, and hence a meritorious claim under 42 U.S.C. § 1983. We also granted certiorari in regard to the separate ruling affirming the award of attorney's fees. We have combined those petitions in the present proceeding, and now reverse.

II. PROCEDURAL DUE PROCESS RIGHTS

In bringing a due process claim under 42 U.S.C. § 1983, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981). That Golden was acting under color of state law in this case is undisputed. Respondents' claim instead centers on the second *Parratt* prong; specifically, that they were deprived of property without due process of law.

In evaluating a due process claim, a court must consider:

> (a) whether a property right has been identified; (b) whether governmental action with respect to the property right amounts to the deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law.

Fusco v. Connecticut, 815 F.2d 201, 205 (2d Cir. 1987); *accord Double I Ltd. P'ship v. Plan and Zoning Comm'n,* 588 A.2d 624 (Conn. 1991). Because we conclude that Respondents have no property right at issue in this case,

our analysis will center primarily on the first factor listed in *Fusco* – the identification of a property right.

Since we have not before considered whether state law procedural protections create a cognizable property right in the land use context, we preface our analysis with an overview of what types of property are protected under the due process clause, and how those rights are ascertained.

The Fourteenth Amendment mandates that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. The definition of what type of property is safeguarded by the Fourteenth Amendment has evolved over the years to encompass not only tangible physical property, but a "legitimate claim of entitlement" to certain circumscribed benefits. *Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972). The identification and parameters of those benefits, and what constitutes a "legitimate claim of entitlement" to them, however, is determined not by the Constitution, but largely by state law. *Id.* Once the state has legislatively created a certain entitlement and a person can demonstrate a legitimate claim to that entitlement, only then is the Fourteenth Amendment implicated to ensure that the person is not deprived of her entitlement absent due process of law. In short, "legislatures create property and courts protect it." Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry,* 71 Calif. L. Rev. 146, 146 (1983).

Having thus established a basis in how constitutionally protected property is created and identified, we now turn to the question of whether a property interest has been established in this case. The court of appeals determined that Respondents had a property interest in the

procedures set forth in the GMC because they had a legitimate claim of entitlement to (1) notice of, and an opportunity to participate in, the special review hearing for the Hillside addition; and (2) denial of the special use permit for the Hillside addition.[4] We will discuss these two potential property interests in turn.

A. Notice and Opportunity to Participate in a Special Use Permit Hearing

The court of appeals held that Respondents had a "legitimate claim of entitlement arising from the GMC, which requires Hillside to obtain a special use permit." *Olson v. Hillside Cmty. Church*, 42 P.3d 52, 55 (Colo. App. 2001). Respondents more specifically claimed that their due process rights were infringed by Petitioners' violation of sections 18.30.020(4), 18.30.020(6), and 18.30.020(7) of the GMC. Those sections require, respectively: (1) that upon receipt of a special use permit application, the

[4] In their brief to this court, Respondents also claim appeal rights to Golden's City Council under Section 18.30.040 of the GMC and to subsequent judicial review under Section 18.30.050 of the GMC. Because the special use permit hearing failed to occur, Respondents' right to appeal that decision to the City Council was subsumed by their subsequent filing in district court. In any event, the right to appeal to the City Council, like the right to notice and participate in the hearing itself, is purely procedural, and does not give rise to due process protection. *See Fusco v. Connecticut*, 815 F.2d 201, 205-206 (2d Cir. 1987) ("The opportunity granted abutting landowners . . . to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the fourteenth amendment.") (citations omitted). As for the right to subsequent judicial review under Section 18.30.050, Respondents have clearly availed themselves of that right in the present proceeding.

Planning and Development Department shall notify all adjacent property owners of the filing, inform them of the date, time, and location of the permit hearing, and advise them that they can inspect the application prior to the hearing; (2) that the property shall be posted, and a notice of the hearing published in a newspaper of general circulation at least twelve days prior to the hearing; and (3) that the Planning Commission shall hold a public hearing on the permit, and shall subsequently make a determination of approval, approval with limitations or conditions, or denial of the special use permit. GMC §§ 18.30.020(4),(6), and (7) (1996).

These code sections set out the specific procedures that must be followed pursuant to a special use permit review; hence, the essence of the court of appeals' holding is that Respondents have a property interest in these procedures.[5] This holding cannot stand. Although the precise issue has never been addressed by this court, the United States Supreme Court and a significant body of case law from other jurisdictions have conclusively established that there can be no property right in mere procedure.

> The point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be

[5] Petitioners argue that because these provisions of the GMC are only triggered when a special use permit application is filed, and because no such application was ever filed in this case, these code sections are simply inapposite to the present discussion. Because the court of appeals held that Respondents had a cognizable property interest in these procedures notwithstanding the absence of an actual application, however, we must analyze this issue accordingly.

> deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (citing *Arnett v. Kennedy,* 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)). *See also Olim v. Wakinekona,* 461 U.S. 238, 251 n. 12 (1983) ("an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause."); *Montgomery v. Carter County,* 226 F.3d 758, 768 (6th Cir. 2000) ("What the Due Process clauses of the Fifth and Fourteenth Amendments protects is 'life, liberty [and] property,' not the procedures designed to protect life, liberty and property."); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence,* 927 F.2d 1111, 1117 (10th Cir. 1991) ("The Supreme Court has recognized that the mere existence of an entitlement to a hearing under state law, without further substantive limitation, does not give rise to an independent substantive liberty interest protected by the fourteenth amendment."); *Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54, 58 (2d Cir. 1985) ("the mere existence of reasonable procedures entitling a person to a hearing under state law does not give rise to an independent substantive liberty interest protected by the Fourteenth Amendment."); *Slotnick v. Staviskey,* 560 F.2d 31, 34 (1st Cir. 1977), ("The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension.");

Double I Ltd. P'ship v. Plan and Zoning Comm'n, 588 A.2d 624, 631 (Conn. 1991) (citing *Cain v. Larson,* 879 F.2d 1424, 1426 (7th Cir. 1989)) ("A party seeking to demonstrate a property interest entitled to protection under the due process clause cannot 'simply rely upon the procedural guarantees of state law or local ordinance.' ").

We find distinguishable the sole case cited by the court of appeals to support its conclusion that "[s]tatutes or regulations can create a legitimate property interest." *Olson v. Hillside Cmty. Church,* 42 P.3d 52, 55 (Colo. App. 2001). In *Painter v. Shalala,* 97 F.3d 1351 (10th Cir. 1996), the court rejected a doctor's claim that he had a protected property interest in receiving Medicare reimbursements calculated in a particular way. The court indicated in dicta that although the doctor may have had a legitimate property interest under the Medicare statute for reimbursement of medical services already rendered, he had no such interest in the procedure by which those reimbursements were calculated. *Id.* at 1357-58.

From this reasoning, the court of appeals erroneously concluded that *Painter* stood for the proposition that a statute itself could confer a property right. This misconstrues the court's logic. Instead, the Tenth Circuit held that a doctor has a property right in his preexisting entitlement to payment of services already rendered, not the enforcement of the Medicare statute per se. Accordingly, we interpret *Painter* consistently with the line of cases cited above.

Respondents nevertheless argue that their case is distinguishable from this body of law because Golden failed to follow its own procedures. Petitioner's failure to follow the procedural requirements of the GMC may have

indeed contravened state law. A state procedural failure alone, however, does not create a violation of constitutional proportions. The crux of our examination is not compliance with or violation of the prescribed procedure; rather, it is determining whether Respondents had a preexisting entitlement which gives rise to constitutional due process guarantees, an inquiry we answer in the negative.

Accordingly, we hold that Respondents did not have a cognizable property interest in their claimed right to notice of, and opportunity to participate in, a special use permit hearing for the Hillside addition. The violations of the GMC that Respondents claim were properly pursued under state law remedies pursuant to C.R.C.P. 106(a)(2), and do not rise to the level of procedural due process claims under 42 U.S.C. § 1983.

B. No Property Interest in Denial of a Special Use Permit Due to the Discretion of the Decision-Maker

We now turn to Respondents' claim that they had a property interest in the denial of the special use permit for the Hillside addition. The court of appeals generally concluded that the GMC provisions were not discretionary, *Olson v. Hillside Cmty. Church,* 42 P.3d 52, 55 (Colo. App. 2001), thereby suggesting that had the special use permit hearing been held, the Planning Commission would have been obligated to deny Hillside's special use permit. We disagree.

Whether a property interest exists in the outcome of a particular zoning board decision depends not on the probability of a favorable result, but on the degree of discretion vested in the decision-maker. *Hyde Park Co. v. Santa Fe City Council,* 226 F.3d 1207, 1210 (10th Cir.

2000). Thus, in order to prove a property interest in the denial of the special use permit, Respondents must show that, had it held the hearing, the Golden Planning Commission was obligated to deny the special use permit. Our analysis concludes that Golden, had it held the hearing, would not have been obligated to deny the special use permit, and hence Respondents have no legitimate claim of entitlement to a denial.

Like the right to certain procedures, the right to certain outcomes has been extensively litigated in the land use context, albeit usually in regard to the failure of a zoning department to *grant* a permit or license.[6] The Tenth Circuit Court of Appeals has described the test for determining the existence of a protected property interest:

> If the decisionmaker is granted a broad range of discretion, the applicant is seeking neither an interest that he or she has already acquired nor a claim upon which he or she should rely, regardless of the characterization of the process involved.

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1117 (10th Cir. 1991); *see also Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54, 59 (2d Cir. 1985) ("the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of

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[6] This distinction is of no consequence to our analysis. Whether a litigant claims a protected property interest with regard to the granting of a permit or its denial are simply opposite sides of the same argument.

due process, there is either a certainty or a very strong likelihood that the application would have been granted.").

Applying the "discretion of the decisionmaker" analysis to the facts of this case, we now turn to the provisions of the GMC in order to determine how much (if any) discretion the Golden Planning Commission would have had in deciding whether to grant or deny Hillside's special use permit. Section 18.30(7) of the GMC provides as follows: "The Planning Commission shall hold a public hearing on the special use permit application, and upon conclusion of the public hearing, make a determination of *approval, approval with limitations or conditions, or denial of the special use permit.*" GMC § 18.30(7) (1996) (emphasis added). This language clearly indicates that the Planning Commission has significant – if not unlimited – discretion to rule on a special use permit application in whatever manner it deems appropriate.

On the other hand, section 18.30.020(5) lists a number of factors the Planning Commission should consider in deciding whether to grant a permit, and arguably limits that body's discretion by mandating that "[s]pecial use permits *shall be granted only if* the usage will not authorize or require any construction or alteration in violation of any ordinances of the city, including the planning and zoning ordinance and the city building code." GMC § 18.30.020(5) (1996) (emphasis added). Given that the trial court noted some twelve specific code and ordinance violations, there is some merit to Respondents' contention that they had a "certainty or very strong likelihood" that the special use permit would have been denied. *Cf. Polenz v. Parrott,* 883 F.2d 551, 556 (7th Cir. 1989) ("where a municipal ordinance provides substantive criteria which, if met, dictate the issuance of a permit, an applicant who has

met those criteria might assert a legitimate claim of entitlement to the permit.").

The GMC is ambiguous with respect to which code section was intended to prevail over the other. Specifically, the question is whether section 18.30(7) prevails over section 18.30(5), or vice-versa. Given the use of the mandatory language in section 18.30(5) ("special use permits shall be granted only if" GMC and building code provisions are complied with), coupled with its list of provisions the Planning Commission "shall" consider, this section could arguably be considered to control over the language of 18.30(7). In other words, the Planning Commission might only have the discretion to grant the permit under 18.30(7) if the project was otherwise in compliance.

We find, however, that section 18.30(7), with its expansive discretionary language, was intended to vest the Planning Commission with the broad degree of flexibility necessary to individually tailor project requirements to particular circumstances, even to the extent of negating the directives of section 18.30(5). Indeed, the special permit process itself has been recognized by other courts as largely discretionary in nature. *See, e.g., Irwin v. Planning and Zoning Comm'n,* 711 A.2d 675, 678-79 (Conn. 1998) ("We previously have recognized that the special permit process is, in fact, discretionary. . . . 'If the special permit process were purely ministerial there would be no need to mandate a public hearing.'") (citing *Conn. Health Facilities, Inc. v. Zoning Bd. of Appeals,* 613 A.2d 1358, 1362 (Conn. App. 1992)).

Moreover, section 18.30.040 vests the City Council with the power, upon appeal by either an applicant or person to whom notice is required, to "uphold, deny, or

modify the decision of the Planning Commission."[7] GMC § 18.30.040 (1996). Section 18.30.040, therefore, creates a wholly separate, yet equally expansive, grant of discretionary power to the City Council. This lends support to our conclusion that sections 18.30(7) and 18.30.040, granting discretion to the Planning Commission and the City Council, respectively, were intended to prevail over section 18.30(5). By vesting discretionary power in these two bodies by the plain language of the code, Golden expressly declined to tie its own hands with respect to the denial of a special use permit.

Because the plain language of two separate sections of the GMC vests broad decision-making powers in both the Planning Commission and City Council to either grant or deny a special use permit, we conclude that had the special use permit hearing been held, Respondents would have had no certainty that Hillside's special use permit application would have been denied. Accordingly, Respondents could have had no preexisting claim of entitlement to the denial of the special use permit.

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[7] This section reads as follows:

> Council review. The applicant and any person to whom notice is required, pursuant to paragraph 18.30.020(3) above, aggrieved by the decision of the Planning Commission on any special use permit, may, within 15 days of the date of the decision thereon, apply to the City Council for review of said decision by filing a request for review with the City Clerk. The City Council shall within 30 days of receipt of the review request, based on the record alone as certified to the Council by the Planning Commission, decide to uphold, deny, or modify the decision of the Planning Commission.

In summary, we conclude that: (1) Respondents' right to notice of, and an opportunity to participate in, the special use permit hearing was solely a procedural claim and as such lacked the requisite property entitlement necessary for the successful assertion of a due process claim; and (2) both the Planning Commission and the City Council had discretion whether to grant or deny the permit, thus negating Respondents' claimed entitlement to the denial of the special use permit. Accordingly, we hold that Respondents have no cognizable property interest in the right to notice of, and participation in, the special use hearing, nor in the denial of the special use permit to Hillside.

III. Adequacy of State Law Remedy

Finally, Respondents assert that because Golden's failure to follow the special use permit procedures mandated by the GMC was a deliberate and intentional decision, made jointly by the Planning and Zoning Commission, the City Council, and the City Attorney, as opposed to a "random and unauthorized" act by a single governmental official, the post-deprivation remedy afforded them by C.R.C.P. 106(a)(2) was inadequate. They claim that in such circumstances, only a pre-deprivation remedy is legally sufficient to protect a claimant's due process rights, a remedy they were denied.[8]

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[8] We first emphasize that we need not reach the merits of this claim. As we explain, the argument that Respondents advance is relevant only when a cognizable property interest hangs in the balance. Because we have found no such property interest at issue in this case, Respondents' argument is essentially mooted at the outset. We address

(Continued on following page)

The United States Supreme Court articulated the distinction upon which Respondents rely in *Parratt v. Taylor,* 451 U.S. 527 (1981). In *Parratt,* the Court rejected a prisoner's claimed violation of his procedural due process rights pursuant to § 1983 when prison officials lost the prisoner's mail-ordered hobby kit due to their failure to follow proper procedures regarding the distribution of prison mail. The Court reasoned that had the loss been the direct result of an "established state procedure," the prisoner would have had a cognizable due process claim which could be adequately addressed only by a pre-deprivation remedy. *Id.* at 538. Since the failure was instead the result of a "random and unauthorized" act taken by prison officials, however, and because such an act could not have been reasonably predicted prior to its occurrence, the Court held that a post-deprivation remedy was constitutionally sufficient in these circumstances. *Id.* at 541. It therefore concluded that a state statute providing redress when officials failed to follow state procedures provided an adequate remedy, and the prisoner's due process rights were accordingly not violated. *Id.*

Respondents' assertion that the failure to follow the dictates of the GMC was an intentional and deliberate decision made by the Planning Commission, City Council, and City Attorney, as opposed to a "random and unauthorized" act by an isolated official, is unsupported by the record. Indeed, the argument is belied by the fact that it was the City Attorney himself who later acknowledged

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it to the extent we do, however, only to clarify our holding that Respondents had an adequate remedy under state law.

that the failure to hold a special use permit hearing was in error.

Even were we to agree with Respondents' claims that the failure to follow the mandates of the GMC was a deliberate decision made by the entirety of the Golden city government, however, we still could not find a violation of Respondents' due process rights requiring a pre-deprivation remedy. This is because, as we indicated earlier, a necessary prerequisite to the *Parratt* distinction is the existence of cognizable property right at issue. In *Parratt,* the prisoner's hobby kit was clearly property; a preexisting right to that property was simply assumed. Here, however, for the reasons we have articulated in Part II of this opinion, Respondents have identified no cognizable property interest to which their claim for a pre-deprivation remedy can attach. Their reliance on the *Parratt* distinction accordingly fails.

We therefore conclude that Respondents had an adequate remedy for their claims under state law, and no basis upon which to seek recourse under § 1983. Section 18.30.050 of the GMC allows any person "adversely affected or aggrieved" by any city action to seek judicial review pursuant to C.R.C.P. 106(a)(4). Respondents successfully sued under that provision, and under C.R.C.P. 106(a)(2) for a writ of mandamus, achieving injunctive relief in the trial court that was not only upheld on appeal, but enhanced by the court of appeals' rejection of the relative hardship doctrine and their order to Hillside to modify its addition to bring it into compliance with the code. These state law remedies were all the process that was due, and Respondents therefore have no recourse to a § 1983 claim. *See, e.g., River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 166-67 (7th Cir. 1994) ("the Constitution does not

require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution."); *Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54, 58-59 ("even an outright violation of state law . . . will not necessarily provide the basis for a federal claim, at least when the applicant has a state law remedy."); *Chesterfield Dev. Corp. v. City of Chesterfield,* 963 F.2d 1102, 1104-05 (8th Cir. 1992):

> It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. . . . we have unequivocally held that a state-law error, no matter how fundamental, cannot in and of itself create a federal due-process violation.

Therefore, we hold that although the City of Golden may indeed have violated the provisions of the GMC, Respondents had an adequate state law remedy under section 18.30.050 of the GMC allowing for a writ of mandamus, and under C.R.C.P. 106(a)(2) which provides for judicial review of governmental decisions.

IV. CONCLUSION

We conclude that Respondents have no cognizable property interest with respect to (1) notice of, and an opportunity to participate in Hillside's special use permit hearing, or (2) the denial of the special use permit to Hillside. Respondents therefore cannot successfully assert a § 1983 claim against the City of Golden. Accordingly, we also reverse the court of appeals' opinion allowing the payment of reasonable attorney's fees under 42 U.S.C. § 1988. We conclude that Respondents received an adequate remedy under state law, and were not deprived of

their right to be heard. We therefore reverse the court of appeals' holding that Respondents procedural due process rights were violated, and remand to the trial court for the determination of whether Hillside adequately complied with all other orders issued by the court of appeals.

COLORADO COURT OF APPEALS

Court of Appeals No. 99CA2070
Jefferson County District Court No. 98CV1842
Honorable Kenneth E. Barnhill, Jr., Judge

Marian L. Olson and Ida M. Brueske,
Plaintiffs-Appellees and Cross-Appellants,
v.
Hillside Community Church, S.B.C., a Colorado non-profit corporation; First Bank of Arvada, N.A.; the City of Golden, a Colorado municipal corporation; and the City Council of the City of Golden, Defendants-Appellants and Cross-Appellees.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE PLANK
Ney and Sternberg*, JJ., concur

September 13, 2001

Victor F. Boog & Associates, P.C., Victor F. Boog, Linda A. Battalora, Lakewood, Colorado, for Plaintiffs-Appellees and Cross-Appellants.

Holley, Albertson & Polk, P.C., Dennis B. Polk, Eric E. Torgersen, Golden, Colorado, for Defendants-Appellants

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2001.

and Cross-Appellees Hillside Community Church, S.B.C. and First Bank of Arvada.

Griffiths, Tanoue & Light, P.C., Steven J. Dawes, Denver, Colorado, for Defendants-Appellants and Cross-Appellees City of Golden and City Council of Golden.

Opinion by Judge PLANK

In this dispute regarding the construction of an addition to the Hillside Community Church, S.B.C. (Hillside) in Golden, defendants, the City of Golden, its City Council, Hillside, and First Bank of Arvada, and plaintiffs, Marian L. Olson and Ida M. Brueske, all appeal the trial court's judgment. We affirm in part, reverse in part, and remand.

Plaintiffs own and reside in homes adjacent to Hillside. In the spring of 1997, Hillside commenced grading without a permit of any kind. The city became aware of the work when one of the plaintiffs complained of dust, but allowed the work to continue. Hillside applied for and, in May 1997, received a "Foundation Only" permit. Hillside did construction work beyond that allowed by the "Foundation Only" permit. Hillside received a building permit in October 1997.

In April 1998, when the addition was substantially completed, plaintiff Marian L. Olson, through her attorney, advised the city that a special use permit had not been obtained for the addition and that the addition might not meet the thirty-foot height limit for structures in that particular residential zone.

In May 1998, the City Attorney determined that the addition was an extension of a nonconforming use under the Golden Municipal Code (GMC) and that a special use permit should have been required prior to the issuance of

any building permit. However, in reliance on the doctrine of comparative hardship described in *Hargreaves v. Skrbina,* 662 P.2d 1078 (Colo. 1983), the city did not revoke the building permit because the structure was already constructed.

In June 1998, the city granted a five-foot height variance to Hillside in excess of the residential zone district height limit. The variance was granted without following the procedures for variances in GMC and without making a finding in conformance with the GMC criteria. In November 1998, a certificate of occupancy was issued.

Meanwhile, in June 1998, plaintiffs filed a complaint alleging five claims for relief: (1) a claim for a prescriptive easement across the Hillside property for access to their backyards; (2) a claim alleging construction of improvements by Hillside was in violation of numerous city ordinances and requesting removal of the improvements; (3) a claim requesting the city require Hillside to comply with the city's zoning ordinances; (4) a claim that the city exceeded its jurisdiction and abused its discretion in granting Hillside a height variance; and (5) a claim that the city denied plaintiffs due process by denying them the opportunity to participate in the special use permit process.

At the conclusion of the evidence and arguments, the trial court entered its judgment that: (1) the city should vacate the certificate of occupancy for the addition, and not issue such certificate or temporary certificate be issued absent approval of a special use permit issued in compliance with the GMC and the building code; (2) Hillside should file an application for special use permit and request a public hearing thereon; (3) the city should

conduct a hearing on that application; (4) the height variance was vacated; (5) under the doctrine of relative hardship, the addition need not be removed or altered provided a special use permit was issued after hearing; and (6) plaintiffs, as prevailing parties were awarded reasonable attorney fees to be paid by the city.

I.

Initially, defendants contend the trial court erred in concluding that plaintiffs have a property interest sufficient to invoke constitutional due process. We disagree and conclude that because a special use permit was not obtained and a hearing was not conducted, plaintiffs were deprived of their due process rights.

To establish entitlement to procedural due process, a plaintiff must demonstrate a property or liberty interest. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A protected property interest exists only when the plaintiff has a legitimate claim of entitlement, as opposed to a unilateral expectation. Furthermore, a claim of entitlement must stem from an independent source, such as state law. *Carlson v. Industrial Claim Appeals Office,* 950 P.2d 663 (Colo. App. 1997). Statutes or regulations can create a legitimate property interest. *See Painter v. Shalala,* 97 F.3d 1351 (10th Cir. 1996).

Here, plaintiffs have a legitimate claim of entitlement arising from the GMC, which requires Hillside to obtain a special use permit. Furthermore, GMC § 18.30.020(7) states, "The Planning Commission shall hold a public hearing on the special use permit application." Because the city never required Hillside to obtain a special use permit, no public hearing was conducted. Thus, plaintiffs were denied their right to notice and hearing.

Accordingly, we conclude plaintiffs had a legitimate property interest arising from the GMC, and the city denied plaintiffs the opportunity to testify at a special use permit hearing. Therefore, the trial court properly found that plaintiffs' procedural due process rights were violated, and they are entitled to a hearing on the permit.

II.

Secondly, defendants contend that the trial court erred in finding plaintiffs were entitled to mandatory relief pursuant to GMC and C.R.C.P. 65(a) and 106(a)(2). Specifically, defendants argue that the GMC provisions are discretionary. We disagree.

C.R.C.P. 106(a)(2) provides that relief may be obtained to compel a governmental body to perform an act that the law specifically enjoins as a duty and to compel the admission of a party to a right from which he or she has been precluded by that government body. Furthermore, the word "shall" in an administrative regulation is presumed to connote a mandatory meaning. *Gerrity Oil & Gas Corp. v. Magness,* 923 P.2d 261 (Colo. App. 1995), *aff'd in part and rev'd in part,* 946 P.2d 913 (Colo. 1997). *See also Save Park County v. Board of County Commissioners,* 990 P.2d 35 (Colo. 1999).

Here, specific sections of the GMC at issue contain the word "shall." For example, § 18.12.010(2) states that "[a]n application . . . shall require the written approval of not less than 80% of the owners" of neighboring properties. Moreover, § 18.12.010(6) states that "[a]ll buildings shall comply with all ordinances of the city, including the planning and zoning ordinance and the city building code except for the specific variance requested and approved."

Therefore, because GMC's provisions are not discretionary and the city did not comply with them, the trial court correctly concluded that plaintiffs were entitled to mandatory relief. We agree with the trial court that the city's representatives' assertions that they had discretionary powers, not defined in ordinances, in interpreting and applying regulatory provisions were "simply incredible."

III.

Thirdly, defendants contend the trial court erred in its inconsistent application of the doctrine of relative hardships. We conclude that the record does not support any application of that doctrine.

In determining whether defendants must remove the offending portion of the building, three factors are considered: (1) good faith reliance on the permit; (2) the neighbors' appreciable impairment compared to the builder's investment; and (3) general respect for municipal ordinances. However, this balancing test is appropriate only if the facts demonstrate the builder acted in good faith. *See Hargreaves v. Skrbina, supra.* Therefore, the doctrine of relative hardships is not applicable in every case. *See Flinn v. Treadwell,* 120 Colo. 117, 207 P.2d 967 (1949).

Here, the record does not support a finding that Hillside acted in good faith.

The trial court found, with record support, that Hillside constructed the addition and the city granted a building permit "in violation of numerous provisions of the GMC and the Uniform Building Code." The court noted at least twelve specific code and ordinance violations, including

violation of the zoning restriction on expansion of a non-conforming use in this zoning district; violation of the thirty-foot height limitation; failure to submit a complying site development plan; submitting a parking plan twelve months after it was required; and numerous violations of grading provisions of the codes, without obtaining a grading permit or certificate of completion. The court also concluded that Hillside had been issued a certificate of occupancy in violation of the codes.

The court's determination that Hillside acted in good faith is untenable in light of the following findings of fact made by the trial court. The evidence established that defendants did not lack the means or knowledge to ascertain "the true facts" regarding the need for a special use permit prior to construction of the thirty-foot height limitation. Also, Hillside started construction without investigating planning and zoning requirements; Hillside was notified of the thirty-foot height restriction prior to issuance of a building permit; when plaintiffs learned of this violation, they promptly notified defendants; Hillside began construction before obtaining a necessary building permit. Further, Hillside continued construction with knowledge that the site development plan had not been approved and was inadequate and "with full knowledge" that its on-site parking plan had not been approved. Moreover, Hillside continued construction even after the city finally notified it of the thirty-foot height limit; Hillside never redesigned the building to meet this limit; and Hillside used the building without having obtained a certificate of occupancy and without complying with many code provisions relating to grading. Finally, Hillside neither applied for a special use permit nor exhausted its administrative remedies.

In light of these facts, the equitable doctrines of estoppel and relative hardships should not be applied to protect Hillside from the consequences of its actions in ignoring a plethora of zoning, planning, and code provisions. Thus, that aspect of the judgment applying the doctrine of relative hardship must be reversed, and on remand the trial court must require Hillside to modify the church addition to comply with existing GMC ordinances.

IV.

Next, defendants contend the trial court erred in vacating a five-foot height variance. We disagree.

The trial court found that the city did not require that Hillside comply with all the ordinances as a condition precedent to Hillside's application for a variance. Further, it found that there was insufficient evidence presented at the variance hearing concerning the topographic conditions that would allow the granting of Hillside's request. The record supports the trial court order requiring that the variance be set aside.

V.

Plaintiffs contend on cross-appeal that the trial court erred in failing to find that the city was obligated to count seats in Hillside's Sunday school facilities in computing on-site parking requirements for the Hillside property. We disagree.

In determining the number of parking spaces for the addition, the city complied with GMC § 18.36.030(4)(A), which states: "Assembly Halls, Churches. One parking space shall be provided for each four seats or similar

accommodations." There is no GMC provision stating how to calculate the number of seats in a church. Moreover, there is some evidence in the record to support the city's calculation of parking spaces, including the testimony of the Director of the Planning and Community Developments Department that Sunday school children would likely come to church with their parents and would not require additional parking spaces.

Accordingly, we find no reason to disturb the city's calculation of on-site parking spaces.

VI.

Next, plaintiffs contend that the trial court erred in failing to order removal of the eight-foot fence along Hillside's north property line. We remand for clarification.

Section 18.40.126(2) of the GMC states, "A solid fence or wall eight (8) feet in height shall be part of a ten (10) foot wide buffer strip between commercial or industrial uses and residential uses." C.R.C.P. 52 states that in actions tried to the court, the court shall find the facts specially and state separately its conclusions of law thereon.

Here, the trial court concluded that § 18.40.126(2) was inapplicable, yet determined a fence was required.

Because we are unable to determine the basis for the trial court's decision, we remand for reconsideration of this issue and a clearer statement of the findings of fact and conclusions of law that support the trial court's eventual decision.

VII.

Finally, plaintiffs contend that the trial court applied the incorrect standard of proof in denying their claim of prescriptive easement. Specifically, plaintiffs argue that the trial court should have applied a preponderance of the evidence standard. We agree.

On remand the trial court must reconsider that claim and apply a preponderance of the evidence standard consistent with *Gerner v. Sullivan,* 768 P.2d 701 (Colo. 1989) (a party who claims a prescriptive easement must prove by a preponderance of the evidence continuous, open, and adverse use of the easement for the statutory period of eighteen years).

Accordingly, the portion of the judgment determining that plaintiffs have a constitutional procedural due process right and are entitled to mandatory relief pursuant to the GMC and C.R.C.P. 65(a) and 106(a)(2), is affirmed, as is the portion of the judgment concerning the five-foot height variance and the seat count. The judgment is reversed in all other respects, and the case is remanded to the trial court to require Hillside to modify the addition to comply with existing requirements; to reconsider the eight-foot wall issue and the prescriptive easement claim; and to conduct additional proceedings consistent with this opinion.

Judge NEY and Judge STERNBERG, concur.

DISTRICT COURT, COUNTY OF JEFFERSON, COLORADO
Case No. 98 CV 1842, Division 2

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

MARIAN L. OLSON and IDA MAE BRUESKE,

Plaintiffs,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a Colorado non-profit corporation; COLORADO BAPTIST GENERAL CONVENTION, a Colorado non-profit corporation; THOMAS K. MURPHY; DOUGLAS KINNER; FIRST BANK OF ARVADA, N.A.; THE PUBLIC TRUS 1 ~ OF JEFFERSON COUNTY, COLORADO; and THE CITY OF GOLDEN, a Colorado municipal corporation; and THE COUNCIL OF THE CITY OF GOLDEN,

Defendants.

The above-entitled action came on for a trial to the Court, the Honorable Kenneth E. Barnhill presiding, on August 9, 1999. Evidence was presented for eight days. Thereafter the parties submitted written closing arguments and proposed FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT. The last brief was filed September 20, 1999. The Plaintiffs were represented by Victor F. Boog, the Defendant Hillside Community Church, S.B.C. (hereinafter "Hillside") was represented by Dennis B. Polk of Holley, Albertson & Polk, P.C., and the City of Golden and the City Council of the City of Golden (hereinafter "Golden") were represented by Steven J.

Dawes of Senter Goldfarb & Rice, L.L.C. Defendant Colorado Baptist General Convention (CBGC) appeared at the pre-trial conference through Hamilton & Faatz, a Professional Corporation. By agreement CBGC did not participate in the trial. It did, however, submit Proposed Findings of Fact and Conclusions of Law sometime after August 20, 1999.

The Court, having considered the evidence presented and the arguments of counsel, enters the following findings of fact, conclusions of law, and judgment.

PLAINTIFFS' FIRST CLAIM FOR RELIEF

The First Claim for Relief in Plaintiffs' Amended Complaint alleges that Plaintiffs have prescriptive rights of access over and across the property of Hillside located at 103 N. Ford Street, Golden, Colorado (hereinafter the (Hillside Property). The evidence presented in support of Plaintiffs' claims established that Plaintiffs and their predecessors in title had indeed traversed the Church's property by motorized vehicle to gain access to their backyards for a period of time sufficient to establish a prescriptive easement provided all other aspects of such entitlement were also established. The Court does not agree with Defendant Hillsides' interpretation of *Brown v. Potter,* 534 P.2d 642 (Colo. App. 1975) that a prescriptive easement must be confined to a single, definite and certain path. The Court of Appeals, in that decision, stated that it did not dispute the argument that a change in the pathway of an easement did not defeat acquisition by prescription if the way remains substantially the same. Indeed, several cases have so held. *See* annotation at 80 ALR 2d 1095. The Court of Appeals in *Potter* found, however, that

the trial court had concluded that the Plaintiff therein had not established facts sufficient to sustain a prescriptive easement and affirmed the trial court. This Court finds that Plaintiffs' predecessors in title traversed around the building or the foundation blocks of the building to gain access to their properties and that, if all elements of the prescriptive easement had been established the single definite and certain path requirement of some decisions would not prevent establishment of a prescriptive easement.

Nevertheless, the evidence in this case clearly established that the use of the asserted easement by Plaintiffs' predecessors was sufficiently sporadic that the elements of notoriety, exclusivity and adversity have not been established by clear and convincing evidence.

The Court recognizes that proof of historic events is often difficult. Nevertheless, to burden a tract of land with a prescriptive easement which would require significant alteration of the present uses of that land requires clear and convincing evidence. *Allen v. First National Bank of Arvada* 208 P.2d 935 (solo. 1949). The evidence was not clear and convincing that Plaintiffs' predecessors use had been continuous, open, notorious, adverse and exclusive. Accordingly, Plaintiffs' First Claim for Relief is dismissed. As a consequence, the security interest in the subject property, held by CBGC is not affected.

PLAINTIFFS' SECOND CLAIM FOR RELIEF

The Second Claim for relief in Plaintiffs' Amended Complaint alleges that Hillside has constructed improvements on the Hillside Property in violation of numerous provisions of the Golden Municipal code (hereinafter the

"GMC"); and that Plaintiffs have standing to seek relief from such violations pursuant to Sections 18.08.050, 18.30.030, and 18.3.040 and 18.30.050 of the GMC, and Rules 106(a)(2) and 65(a) and (f) of the Colorado rules of Civil Procedure. The evidence presented in suppo.t of the Plaintiffs' Second Claim for Relief establishes, and the Court finds, that:

1. Hillside has constructed, and Golden granted Hillside a building permit to construct improvements upon the Hillside Property in violation of numerous provisions of the GMC and the Uniform Building Code as adopted by Golden (hereinafter "UBC"). Those provisions of the GMC and UBC violated included, but are not limited to, the following:

a. Section 18.08.030 of the GMC, which provides that it is unlawful to obtain a building permit when the proposed construction does not fully conform to the zoning regulations then in effect. In this case, the construction undertaken by Hillside did not conform to the following zoning regulations then in effect:

(i) Section 18.44.060 of the GMC, which precludes expansion of a church as a nonconforming use in the R-1 Zone District

(ii) Section 18.28.085 and Chapter 18.30 of the GMC, which require approval of a Special Use Permit for a church in the R-1 Zone District; and

(iii) Sections 18.20.030(2) and 18.28.200 of the GMC, which limit the height of buildings to thirty feet in the R-1 Zone District;

b. Section 18.08.030 of the GMC, which provides that it is unlawful to construct any building or other

structure without obtaining a building permit from the City. In this case, Hillside proceeding to construct a building prior to obtaining a building permit from the City;

c. Section 18.40.010(2) of the GMC, which requires approval of a site development plan prior to construction of any building or structure. In this case, Hillside did not obtain approval of a site development plan until the building constructed by Hillside was substantially completed. In addition, Hillside never submitted a site development plan which included all of the application requirements set forth in Section 18.40.080 of the GMC, such as grading, drainage, and erosion control measures; a legal description of the property verified and signed by a registered land surveyor in the State of Colorado; final draining plan and report in conformance with the City of Golden Storm Water Management manual; and a final grading and erosion control plan in conformance with the City of Golden Engineering Regulations. Hillside also failed to comply with various other site development requirements, including those set forth in:

(i) Section 18.40.114(12) of the GMC, which specifies that "[e]ach site development . . . shall provide bicycle parking areas with a number of spaces equal to 10% of the number of automobile parking spaces provided. Such facilities shall be provided as racks or lockers, and be located in well lit [sic] accessible areas

(ii) Section 18.40.126 of the GMC, which requires all turf and live planting areas in excess of 100 square feet in area to be served by a permanently installed irrigation system. The Court further finds that such irrigation systems were not specifically exempted by the

Planning Director based on a determination that such irrigation systems were unnecessary as a result of the size, location or alternate maintenance accommodations applicable to the areas in excess of 100 square feet

d. Section 18.36.050 of the GMC, which requires a parking plan approved by the Building Official in advance of the issuance of a building permit. In this case, Hillside ultimately submitted a parking plan approximately 12 months after issuance of a building permit, which indicated seating in the new sanctuary would be limited to 248 seats instead of the 358 seats for which the sanctuary was designed;

e. Sections 16-18.020(1) of the GMC and 3306.1 of the UBC, which provide that no person shall do any grading without first having obtained a grading permit. The Court finds that the extensive grading activities performed by Hillside on the Hillside Property were not exempt from a grading permit under any of the provisions contained in Section 15.18.020(2) of the GMC. The Court also finds that Hillside's grading activities violated numerous grading requirements, including the following:

(i) Sections 15.18.050(7) of the GMC and 3301.1 of the Uniform Building Code as adopted by Golden ("UBC"), which provide that slopes for permanent fills shall not be steeper than 1 unit vertical in 2 units horizontal; and that no fill shall be placed adjacent to any building unless such building is capable of withstanding the additional load;

(ii) Section 15.18.050(6) of the GMC and 3313.2 of the UBC, which require proper preparation of the ground for fill placement; and

(iii) Sections 15.18.050(4) of the GMC and 3313.3 of the UBC, which limit the types of fill material which are permitted.

f. Section 15.08.391 of the GMC, which requires the submittal of a Sediment and Erosion Control Plan approved by the city engineer as a prerequisite to the issuance of a grading permit. The court finds that the City Engineer never waived a Sediment and Erosion Control Plan in writing as required by Section 13.30.040 of the GMC.

g. Section 15.08.125 and 13.30.030(b) of the GMC, which requires that submittal of a certificate of completion (i.e, a written statement signed by a state licensed engineer employed by the applicant stating that all construction, earth disturbance work, and permanent storm water quality control measures were inspected by the engineer and performed in compliance with the approved erosion and Sediment control Plan and/or the approved Stormwater Quality Control Plan and associated specifications), and

h. Page 14 of the City's Street, Sidewalk and Drainage Specifications, which requires a building permit application prepared and stamped by a Professional Engineer registered by the State of Colorado for any retaining wall or series of retaining walls in excess of 48 inches in height.

2. Hillside was issued a certificate of occupancy for the improvement constructed on the Hillside Property in violation of numerous provisions of the GMC and UBC including:

a. Section 109.3 of the UBC, which requires the building official to find that there are no violations of the UBC or GMC. As of November 13, 1998, when the Certificate of Occupancy was issued, numerous violations of both the UBC and the GMC still existed as previously noted herein;

b. Section 18.40.140(1) of the GMC, which requires completion of all landscape improvements indicated on an approved site development plan before issuance of a Certificate of Occupancy; and

c. Sections 13.30.080 and 15.08.125 of the GMC which require an applicant to submit a certificate of completion as a prerequisite to obtain a certificate of occupancy. In this case, no certificate of completion has ever been submitted by Hillside.

3. Golden required Hillside to construct an eight-foot high fence along the north property line of the Hillside Property pursuant to Section 18.40.126(2) of the GMC, which section is inapplicable. No other section of the GMC requires or authorizes an eight-foot high fence.

Hillside and Golden have alleged that the Plaintiffs' claims are barred by various affirmative defenses including, inter alia, the doctrines of equitable estoppel and relative hardships. The evidence with respect to such defenses establishes that

1. Neither Hillside nor Golden lacked the means of knowledge to ascertain the true facts, namely that: (a) Hillside required a special use permit in order to legally construct any church related improvements on the Hillside Property; and (b) the Hillside Property was in the R-1 zone District which limits the height of buildings to 30 feet.

2. Hillside undertook construction activities on the Hillside Property without investigating applicable planning and zoning requirements.

3. Hillside was notified by Golden of the 30-foot height limitation on building prior to the issuance of a building permit for the construction of the church addition on the Hillside Property.

4. Once Plaintiffs learned that Hillside required a special use permit as a prerequisite to the construction of church related improvements on the Hillside Property and that Hillside's building exceeded the 30-foot height limitation, such facts were promptly brought to the attention of Golden and Hillside.

5. Hillside began construction of the building on the Hillside Property prior to obtaining a necessary building permit

6. Hillside failed to submit required documentation for issuance of a building permit despite being furnished with information indicating the documentation required

7. Hillside initiated and continued construction activities without implementing fugitive dust control measures and providing adequate trash containers, as required by Section 5.01.070(a) and (c) of the GMC.

8. Hillside continued construction pursuant to the building permit issued by Golden on October 30, 1997, with full knowledge that its site development plan had not been approved and was inadequate.

9. Hillside continued construction pursuant to the building permit issued by Golden on October 30, 1997,

with full knowledge that its on-site parking plan had not been approved.

10. Hillside continued construction pursuant to the building permit issued by Golden on October 30, 1997, notwithstanding notification by Golden that its building exceeded the 30-foot height limit in the R-1 zone district.

11. Hillside never redesigned its building to satisfy the 30-foot height limit despite being advised that its building as designed exceeded such height limitation.

12. Hillside utilized the premises under construction even through it had no certificates of occupancy.

13. Hillside's grading activities on the Hillside Property violated numerous provisions of the GMC and UBC

14. Hillside has never applied for a special use permit, and has not exhausted its administrative remedies for applying for a special use permit, in accordance with Chapter 18.30 of the GMC.

Based upon the findings above, the Court also finds:

1. The improvements constructed by Hillside on the Hillside Property are in violation of numerous provisions of the GMC and UBC

2. The Plaintiffs, as citizens of Golden and owners of property abutting the Hillside Property, have standing to seek relief from violations of the GMC pursuant to the express provisions of Sections 18.08.050, 18.30.030, 18.30.040, and 18.30.050 of the GMC. Plaintiffs also have standing to seek relief pursuant to C.RC.P. 106(a)(2) and C.RC.P. 65(a). The scope and breadth of relief available to

the Plaintiffs is set forth specifically in section 18.08.050 of the GMC as follows:

> **18.08.050 Legal action**. In case any building or structure is, or is proposed to be erected, constructed, reconstructed, altered, maintained or used, or any land is proposed to be used, in violation of any provision of this title, or any amendment thereof, the city council, the city attorney or any owner of real estate within the city, in addition to other remedies provided by law, may institute injunction, mandamus, abatement or any other appropriate action or proceeding to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use. (Ord. 682 § 2(5), 1973).

Thus, Plaintiffs are expressly authorized to seek relief such as removal of improvements illegally constructed on the Hillside Property, or the vacation of a certificate of occupancy permitting the unlawful use of such improvements, as prayed for by Plaintiffs in their Amended Complaint.

3. During the trial the City, through its authorized representatives, repeatedly attempted to assert discretionary powers not defined in the Ordinances or Code, or to rely upon undisclosed interpretations of Code provisions which would, in retrospect, justify the City's failure or refusal to follow clear statements of policy or precise, printed regulations. The City's representatives professed long standing practices and procedures governing administrative actions and decisions, which are not contained within the clear language of the Ordinances or Code and therefore not available for interpretation by a citizen

seeking to determine appropriate procedures or ways to interpret specific regulatory provisions. Some of the testimony by City officials or employees regarding interpretations asserted in justification of past positions taken or decisions made were simply incredible. Citizens should be entitled to rely upon the Code, Ordinances and regulations as written. No one should be required to anticipate unexpressed interpretations, not available (except ex post facto) to ordinary citizens, which are justified solely as "discretionary" actions constituting controlling principles.

4. Height limits are imposed by municipalities for various reasons. One of those reasons is to protect citizens, living within a particular zone, from having sight, light and views obstructed by structures exceeding a specific height limit within the same zone. The height of a building at a particular wall or roof line is not diminished in any sense by averaging that discernible height with lower points at other parts of the building or by adding fill dirt or building flower boxes designed to diminish the distance between the top of the building and the ground. The height of the tallest wall or roof line is still the same from the viewpoint of the neighbor who is one of those sought to be protected by the height limit in the first instance. Artificial formulas designed to effectuate compliance with height limits do not alter the physical facts as viewed by citizens who are within the group initially protected by the ordinance. The smoke screen of height averaging the fill dirt added solely to diminish the original distance between the foundation of the building and the peak of its roof or the top of a wall does not obliterate the neighbor's view of the building nor its overall height in comparison to other buildings surrounding the structure.

5. This Court is compelled to state that respect for and compliance with city ordinances is one of the goals of the judiciary, at least this Court. The surest way to stop the erection of buildings in defiance of zoning ordinances is to remove all possibility of gain to those who build illegally. Prevention will never be accomplished by compromise or payment of an insignificant amount to those damaged by the illegal structure. *Welton v. 40 East Oak Street Building Corp.* 70 F2d 377 (7th Cir. 1934) quoted in *Hargreaves v. Skrbina,* 635 P2d 221 (Colo. App. 1981). To reward one who builds in violation of the zoning ordinances by ignoring the violations or by refusing to compel removal of the offending structure invites others to violate the law with some comfort that if their building is completed dire consequences will not befall [sic] miscreant. A decision which sanctions code violations is clearly to be avoided unless the consequences of such decision create an even greater evil.

The issue then becomes one of determining the equities of the parties since injunctive relief would certainly require significant expenditures by the church.

6. The church leadership was not sophisticated in matters of building codes and zoning requirements. They knew nothing, initially, of height limits, special use permits, parking or grading requirements or other technical building restrictions. The church hired an unlicensed architect who did not know of or ignored applicable height limits in the residential zone where the church is located. When the church was advised of the applicable height limit and other code violations the leadership approached the city. Had the city revoked the building permit, stopped work or required a special use application the problem would have been solved at an early stage when modification of

design could have been accomplished at much less expense than would be required at this time.

It is unlikely that if a special use permit allowing expansion of a non-conforming use had been granted it would have encompassed a building which did not comply with code provisions.

The City did not so act. City officials decided that a special use permit was not needed (a position later changed by the City) and initiated a process to grant a height variance. The church relied on the City. The City, after changing its position regarding the necessity of a special use permit to expand an existing non-conforming use, decided that a hearing on an application for special use permit would be useless in this case because the building had been completed, or at least partially completed.

Despite, the fact that the church members learned of code violations the leadership relied on the City for guidance with respect to code compliance. Although the church had knowledge of certain code violations, this Court cannot find that it acted in bad faith.

Therefore, despite the efficacy of the rationale behind the decision of the Court of Appeals in *Hargreaves v. Skrbina supra* this Court is compelled to follow the ruling of the Supreme Court in the same case. *Hargreaves v. Skrbina*, 662 P.2d 1078 (solo. 1981). Under the doctrine of relative hardship as therein articulated, this Court finds that, because the church relied upon the City, in good faith, relief requiring removal of the offending use would not be fair. In the event that a special use permit is not granted, as hereinafter addressed, a different result could be required.

This Court also finds that although the addition to the church dominates Plaintiffs' view from their homes, there was no evidence offered that views of other natural features were substantially impaired or that Plaintiffs have suffered any monetary damages other than attorneys' fees. If removal of the offending use, or substantial alteration of the structure were required, Hillside could lose all or a substantial portion of its investment, which, according to the testimony, was in the amount of approximately $550,000.

As stated by the Supreme court in *Hargreaves*, *supra*, at page 1081, promotion of respect for city ordinances is only one factor to be considered. When the City is responsible for "authorizing" construction in violation of its own ordinances, it would be anomalous to penalize the church in an effort to promote respect for those very ordinances. Although the Plaintiffs have suffered and will continue to suffer significantly as a result of the size of the building next door to their residences, they have sought only removal of the building. The relative hardship to the church is of such magnitude that the Court will not so order.

PLAINTIFFS' FOURTH CLAIM FOR RELIEF

The fourth Claim for Relief in Plaintiffs' Amended Complaint seeks an Order of this Court holding that the City Council of the City of Golden exceeded its jurisdiction and abused its discretion in granting Hillside a variance authorizing a maximum building height of more than 35 feet. Based upon a review of the record of proceedings before the City Council of the City of Golden, and applicable provisions of the GMC, it is undisputed that:

1. Hillside never satisfied the provisions of Section 18.2.010(2) of the GMC, which state than an application for a variance "shall" require the written approval of not less than 80% of the owners of lots, tracts or parcels, any portion of which are within 100 feet of the property line of the site of the requested non-conforming building; and the further provision that [a]ny person failing, after due diligence, to obtain within 60 days, the necessary abutting and surrounding property owner signatures may submit their petition directly to the City Council. . . .

2. Hillside never satisfied the provision of Section 18.2010(6) of the GMC, which requires that the building for which Hillside sought a height variance comply with all ordinances of the City, except for the specific variance requested. Here, the building in question was not in compliance with all ordinances of the City since such building constituted an illegal extension of a non-conforming use (see Sections 18.44.060) and 18.28.085 of the GMC), and Hillside never obtained approval of a Special use Permit by the Golden Planning Commission, in accordance with the provisions of chapter 18.30 of the GMC.

In light of the aforesaid facts, it is evident that the City Council of the City of Golden did not follow the substantive and procedural provisions of its own ordinances. It thus exceeded its jurisdiction and abused its discretion in granting Hillside a height variance authorizing a maximum building height of 35 feet. Accordingly, the City's action in granting the variance must be set aside.

Further, the City now recognizes its error in not requiring an application for and hearing upon a request

for special use permit necessary to the expansion of a non-conforming use. The City argues that such application and hearing now would serve no useful purpose inasmuch as the property has long been used as a church, the addition has been constructed and a certificate of occupancy has issued. The City further asserts that the doctrine of relative hardships requires that the failure to require a special use permit application and hearing should now be ignored.

The Court concludes that such procedure may, indeed, be useless. It is possible, however, that the Planning Commission, when presented with all the facts, may construe the building code and the City Ordinances differently than have some of the City officials and employees.

Recognizing that the appropriate procedure may well be akin to locking the barn after the horse has been stolen, the Court nevertheless determines that the Plaintiffs should be given an opportunity to present any evidence and arguments they wish to the Planning Commission.

Consequently, the Court hereby orders that the City revoke the Certificate of Occupancy issued to Hillside, accept an application for special use permit from Hillside and set a hearing on such application. Hillside is similarly ordered to submit such an application for a special use permit.

PLAINTIFF'S FIFTH CLAIM FOR RELIEF

The Fifth Claim for Relief in the Plaintiffs' Amended Complaint seeks relief based upon allegations that Golden deprived Plaintiffs of due process of law by issuing building

permits and a Certificate of Occupancy to Hillside without requiring Hillside to comply with the special use permit process as set forth in chapter 18.30.020(4) of the GMC. Pursuant to the GMC, such process is mandatory, not discretionary. Pursuant to such process, Plaintiffs are entitled to notice and an opportunity to be heard. *See* Section 18.30.020(4) of the GMC, and Golden's answer to Amended Complaint, paragraph 24. Here, Plaintiffs have been denied such due process rights.

In *McArthur v. Zabka*, 494 P.2d 89, 93 (solo. 1972), the Colorado Supreme Court stated:

> T]he Council, in the exercise of its police power, must afford procedural due process as it has been delineated in its zoning code. The public, – or at least those whose interests are affected . . . have the right to rely upon the Council following its own ordained procedures.

Because the council in the *McArthur v. Zabka* case failed to follow its own procedures, its actions were reversed. The same result should occur here.

Plaintiffs have also alleged that Golden, by granting a building permit and a certificate of occupancy to Hillside without requiring Hillside to comply with the special use permit process, has deprived them of rights guaranteed by the Constitution of the United States, while acting under the color of law, in violation of 42 U.S.C. § 1983.

Both the fourteenth amendment to the United States Constitution and Article II. Section 25 of the Colorado Constitution provide that no person shall be deprived of property without due process of law. *Cleveland Bd. Of Education v. Loudermill*, 470 US 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985); *Givan v. City of Colorado Springs*, 876

P.2d 27, 34 (solo. App. 1993). To prove that such protections have been violated, the Plaintiff must show (1) that the government action interfered with a property interest, and (2) the Defendant failed to use sufficient constitutional protections in depriving the property interest of the Plaintiff. *Kentucky Dept. of Corrections v. Thompson*, 490 US 454, 109 S. Ct. 1904, 104 L.Ed.2d 506 (1989).

State law governs the determination of whether Plaintiffs have a protected property interest. *Cleveland Bd. Of Education v. Loudermill, supra*. In Golden, property owners are accorded property interests in zoning matters, and specifically special use permit matters, by the City of Golden Zoning Ordinance. *See*. For example, the provisions in sections 18.30.020(4), (6), and (7), 18.30.040, and 18.30.050 of the GMC. The Colorado courts have also conclusively established that nearby landowners have standing to seek judicial review of the actions of zoning authorities. *See Dillon Companies, Inc. v. City of Boulder*, 515 p.2d 627 (Colo. 1973); *Norris v. Grimsley*, 585 P.2d 925, 927 (Colo. App. 1978) (stating that only by permitting participation by local residents in government actions affecting their property "will their legitimate interests in, among other things, the character of their neighborhood, the safety of their children, and the value of their property, be adequately protected"). Thus, it is clear that Plaintiffs have a constitutionally protected property interest to see that local zoning and planning ordinances are followed, where non-compliance affects their property.

This Court concludes that Plaintiffs' procedural due process rights have been violated by Golden's actions, and that the deprivation of Plaintiffs' due process rights could have been avoided.

Irrespective of the fact that the City argues that nothing may be accomplished by requiring notice and a hearing now, after the building has been completed, a certificate of occupancy issued and the use established, the only manner in which the Plaintiffs can be afforded an opportunity to present their arguments to the Planning Commission is to require a hearing. Consequently, the same orders as entered heretofore regarding the Plaintiff's Fourth Claim for Relief are hereby entered as if set forth herein with particularity.

Section 42 U.S.C. § 1988 authorizes trial courts to award reasonable attorney fees to "prevailing parties" in actions to enforce a provision of section 42 U.S.C. § 1938 [sic]; and the statute consistently has been interpreted broadly in favor of such awards. *International Sac. Krishna Consciousness, Inc. v. Colorado State Fair and Indus. Exposition Comm'n.*, 673 P.2d 368, 372 (Colo. 1983). Where, as here, Plaintiffs are the "prevailing parties" on their Fifth Claim for Relief asserting denial of due process by Golden, and the Plaintiffs' attempts to obtain due process from Golden without the necessity of litigation were totally unavailing, the Court concludes that Plaintiffs are entitled to a reasonable attorneys fee as part of the costs.

Plaintiffs' attorney shall submit an affidavit of attorney's fees. If Defendant City objects to the reasonableness or necessity of such fees the City may request a hearing.

Plaintiffs' C.RC.P. 106(a)(4) Review

Plaintiffs seek judicial review of the City Council's decision approving an R-1 zone height limitation variance. The Court has reviewed the Plaintiffs' Opening Brief,

Defendant City's Answer Brief, Plaintiffs' Response and the record of the proceedings.

In addition to the findings set forth hereinabove with regard to Plaintiffs' Fourth Claim, the Court finds as follows:

1. Inasmuch as Plaintiffs participated in the variance hearing they may not be heard to complain of the lateness of the notice.

2. Hillside paid the application fee.

3. No substantial rights of the Plaintiffs were prejudiced by Hillside's failure to sign the application. As a matter of fact, as stated hereinabove, the application was actually prepared by a representative of the City.

4. The City did not follow its own regulation by requiring that the applicant obtain approval of 80% of its neighbors for the variance request. The waiver of this requirement did not harm the Plaintiffs.

5. There was insufficient evidence to grant a variance because of exceptional narrowness, shallowness or slope of the property or exceptional topographic conditions, and insufficient findings related thereto.

6. The undue hardship addressed by the City Council occurred by reason of the church's own acts.

7. There was insufficient evidence to justify a conclusion that the essential character of the neighborhood was not altered.

8. There was insufficient evidence to justify the conclusion that the intent and purpose of the

zoning title had not been impaired. *See* specific findings set forth above regarding Plaintiffs Fourth Claim.

Consequently, the city's approval of the height variance constituted an excess of its jurisdiction and an abuse of discretion. Accordingly, in accordance with C.R.C.P. 106 (a)(4) the City's grant of a variance is set aside.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. Golden shall forthwith vacate the Certificate of Occupancy for the addition to the pre-existing church structure on the Hillside Property which was issued to Hillside on November 13, 1998; and no Certificate of Occupancy or Temporary Certificate of Occupancy shall be issued for any portion of such addition absent approval of a Special Use Permit issued pursuant to the provisions of Chapter 18.30 of the GMC, and compliance with all other provisions of the GMC and UBC which have heretofore been violated as set forth in the findings of fact herein.

2. Hillside shall file an application for Special Use Permit and request a public hearing thereon.

3. The City shall conduct a hearing on Hillside's application for Special Use Permit.

4. The height variance granted to Hillside by the City Council of the City of Golden is hereby vacated and set aside. The Court does not, by this Order, intend to inhibit a variance provided the same is adopted in accordance with all applicable provisions of the Code and law.

5. Under the doctrine of relative hardship, the addition to the church need not be removed or altered provided a Special Use Permit is issued after hearing.

6. Plaintiffs are awarded reasonable attorney's fees to be paid by the City of Golden as part of the costs awarded to them as prevailing parties. Plaintiffs' counsel shall submit an affidavit of attorney's fees. Golden may stipulate thereto. If Golden objects to the reasonableness or necessity thereof the Court will determine the fees or will set a further hearing.

Counsel are requested to pick up the exhibits offered by each and to retain them for all periods of time covered by Appellate Rules and Rule 60(b), C.R.C.P.

Dated this 6th day of October, 1999

BY THE COURT

Kenneth E. Barnhill, Senior District Judge

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CASE NO. 01SC808
and 01SC878

CERTIORARI TO THE COURT OF APPEALS, 99CA2070 and 00CA0570
DISTRICT COURT, JEFFERSON COUNTY, 98CV1842

Petitioners:

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

v.

Respondents:

MARIAN L. OLSON and IDA M. BRUESKE.

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 16, 2002.

[SEAL]

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Excerpts from Golden Municipal Code

1.01.020(11) Shall, May. "Shall" is mandatory, "may" is permissive.

18.08.030 Enforcement. It is unlawful to erect, construct, reconstruct, alter or change the use of any building or other structure within the city without obtaining a building permit from the city building official or his authorized representative, and no permit shall be issued unless the plans of and for the proposed erection, construction, reconstruction, alteration or use fully conform to the zoning regulations then in effect . . .

18.08.040 Violations designated. It is unlawful to erect, construct, reconstruct, alter, maintain or use any building or structure or to use any land in violation of any provision of this title, or any amendment thereof. Any person, firm or corporation, either as owner, lessee, occupant or otherwise, who violates or who interferes in any manner with any person in the performance of a right or duty granted or imposed upon him by the provisions of this title, is guilty of a misdemeanor.

18.08.050 Legal action. In case any building or structure is, or is proposed to be erected, constructed, reconstructed, altered, maintained or used, or any land is proposed to be used, in violation of any provision of this title, or any amendment thereof, the city council, the city attorney or any owner of real estate within the city, in addition to other remedies provided by law, may institute injunction, mandamus, abatement or any other appropriate action or proceeding to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use. (Ord. 682 § 2 (5), 1973).

18.28.085 Special uses in the RE and R1 districts. The following uses are permitted in the RE and R1 districts subject to approval of a Special Use Permit:

(1) Churches and places of religious assembly.

. . .

18.30.020 Specific Procedure. Special use permits before the Planning Commission shall conform to the following specific procedure: . . .

(3) Application for the special use permit shall be filed with the Planning and Development Department no less than thirty (30) days prior to the meeting at which said permit request will be considered by the Planning Commission. . . .

(4) After receipt of the application, the Planning and Development Department shall notify by first class mail the owners of properties located within three hundred (300) feet of the exterior property lines of the property containing the proposed special use that a special use permit application has been filed and that they may review the application during the Planning and Development Departments's [sic] regular hours. This notice will contain the date, time and location of the planning Commission hearing, and will be mailed at least twelve (12) days prior to the hearing.

(5) Special use permits shall be granted only if the usage will not authorize or require any construction or alteration in violation of any ordinances of the city including the planning and zoning ordinance and the city building code. The Planning Commission shall consider the following in making their decision:

(a) Compatibility with the surrounding area.

(b) Harmony with the character of the neighborhood.

(c) Whether there exists a need for the proposed development.

(d) The effect of the proposal upon future land uses or the development of the immediate area.

(e) Whether an exception from the standard code requirements or limitations is warranted by virtue of design and amenities incorporated in the development proposal.

(f) Whether the existing and proposed streets are suitable and adequate to carry the anticipated traffic within the development proposal area and its surrounding vicinity.

(g) Whether the proposal is in accordance with the Golden Comprehensive Plan.

(h) Whether the proposal will result in an over intensive use of land or depletion of natural resources.

(i) Whether the proposal will require a level of community resources greater than which is available.

(j) Whether the proposal will cause significant air, odor, water or noise pollution.

(k) Whether the proposal will be detrimental to the health, safety or welfare of the present or futrue [sic] citizens of the City of Golden.

(l) With respect to an application for a special use permit for a commercial "low power" telecommunication site, the Planning Commission shall also consider (a) how the proposed site fits into the overall communications network within the city of Golden and why the facility at this location is necessary, (b) whether the proposed facility is sited to take advantage of existing land forms and structures, (c) how the proposed facility is designed to minimize adverse visual impact, (d) compatibility with the surrounding area, and (e) whether consolidation of the proposed facility with other existing facilities is feasible and not otherwise detrimental.

(6) Notice of such public hearing shall be published once in a newspaper of general circulation within the city at least twelve (12) days prior to the hearing. In addition, the site in question shall be continuously posted with a sign for a period beginning no less than twelve (12) days prior to the date of the hearing, said posting to be performed by the Planning and Development Department. The sign and posting shall be in conformity with the posting utilized in zoning amendment public hearings.

(7) The Planning Commission shall hold a public hearing on the special use permit application, and upon conclusion of the public hearing, make a determination of approval, approval with limitations or conditions, or denial of the special use permit. . . .

18.30.040 Council review. The applicant and any person to whom notice is required, pursuant to paragraph 18.30.020(3) above, aggrieved by the decision of the Planning Commission on any special use permit, may, within 15 days of the date of the decision thereon, apply to the

City Council for review of said decision by filing a request for review with the city Clerk. The City Council shall within 30 days of receipt of the review request, based on the record alone as certified to the Council by the Planning Commission, decide to uphold, deny or modify the decision of the Planning Commission. (Ord. 1107, 1991).

18.30.050 Judicial Review. In order to assure a plain, simple and prompt judicial remedy to persons or parties adversely affected or aggrieved by a City action under this Chapter, the provision of Rule 106(a)(4) or the Colorado Rules of Civil Procedure, shall apply to judicial review of any action hereunder. (Ord. 1107, 1991).

18.40.010 Applicability of the site development regulations. . . .

> (2) No building permit shall be issued for the construction of any building, structure, parking area, or loading area, or for any substantial alteration to existing buildings, structures, parking areas, or loading areas without first obtaining the approval of a site development plan from the Director of Planning and Development . . .

Section 18.44.060 Extensions. A nonconforming use shall not be extended. (Ord. 682 § 9 (6), 1973).

Section 13.30.080 Certificate of occupancy requirement. No certificate of occupancy for any building shall be issued pursuant to Chapter 15.08 of the Golden Municipal Code unless the applicant for said certificate of occupancy submits a certificate of completion to the city engineer and said certificate of completion is approved by the city engineer.

Supreme Court, U.S.
FILED
APR 18 2003
OFFICE OF THE CLERK

No. 02-1373

In The

Supreme Court of the United States

MARIAN L. OLSON and IDA MAE BRUESKE,

Petitioners,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF GOLDEN AND THE CITY COUNCIL OF GOLDEN

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QUESTIONS PRESENTED

1. Whether this Court is bound by the Colorado Supreme Court's interpretation of an ordinance governing special use applications, pursuant to which it determined that the planning commission had broad discretion to approve or deny an application, and, therefore, Petitioners had no protected property interest in having an adjoining landowner's application denied.

2. If this Court declines to give effect to the Colorado Supreme Court's interpretation, whether the test articulated by this Court in *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), for determining when an applicant for a governmental benefit has a property right protected by the Fourteenth Amendment applies to the question of whether an opponent of another party's application can acquire a property interest in having the application denied.

3. If this Court determines that Petitioners have a property right protected by the Fourteenth Amendment, whether the Colorado Supreme Court correctly applied this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986), in deciding that Petitioners had received due process.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 58 P.3d 1021 (Colo. 2002), and appears at Pet. App. 1-23. The opinion of the Colorado Court of Appeals is reported at 42 P.3d 52 (Colo. App. 2001), and appears at Pet. App. 24-33. The *Findings of Fact, Conclusions of Law and Judgment* of the district court is unreported and appears at Pet. App. 34-59.

In addition to the opinions contained in Petitioners' Appendix, two decisions in post-judgment contempt hearings in this case are relevant to the issues raised by Petitioners. In the first hearing, a bench ruling of the trial court finding contempt was reversed by the Colorado Court of Appeals in an unpublished opinion which appears at App. 1 through App. 5. In the second hearing, the trial court found no contempt had occurred. The trial court's written order is found at App. 6 through App. 8; it has been appealed by Petitioners.

STATEMENT OF THE CASE

Petitioners Marian L. Olson ("Olson") and Ida Mae Brueske own homes in the City of Golden, Colorado ("Golden") adjacent to Hillside Community Church, S.B.C. ("Hillside"). A Golden planning official mistakenly issued two building permits to Hillside in May 1997 and October 1997 for construction of an addition to Hillside's existing church building. At the time the permits were issued, the church property was located within an R-1 zone district. Pet. App. 37. Under pertinent provisions of the Golden Municipal Code in effect at the time (the "GMC"), churches were not a use permitted by right in such district. *Id.*

Therefore, the proposed addition did not conform to the applicable zoning regulations.

After the addition was substantially complete, Petitioners wrote to Golden asserting that the building permits had been issued in error. Pet. App. 4. The city attorney determined that Petitioners were correct, but Golden, relying upon the doctrine of relative hardship set forth in *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo. 1983), declined to revoke the building permits or require that the addition be modified or torn down. Pet. App. 4-5.

The GMC provides that no structure shall be constructed without first obtaining a building permit, and that no building permit shall issue unless the structure complies with the zoning regulations. Pet. App. 60, GMC § 18.30.030. If any structure is erected in violation of GMC § 18.30.030, any owner of real property within the city may file a suit for injunction or mandamus. Pet. App. 60, GMC § 18.30.050. Petitioners filed suit asserting various claims for relief, including claims for injunction and mandamus pursuant to GMC § 18.30.050. Following an eight-day trial, the court entered an order of mandamus and an injunction directing Golden to vacate the certificate of occupancy for the addition and directing that no new certificate of occupancy be issued absent compliance with all other provisions of the GMC and the building code. Pet. App. 55. The trial court determined that under the doctrine of relative hardship the structure did not need to be removed, provided that the appropriate approvals were subsequently obtained and the structure was made to comply with other code provisions. Pet. App. 56. The Colorado Court of Appeals reversed the trial court's ruling that the doctrine of relative hardship applied, and

affirmed its decision with respect to the order of mandamus and injunction.

Although Hillside had not applied for a special use permit and Golden had not issued one, Petitioners also asserted a claim under 42 U.S.C. § 1983 alleging that by issuing the building permits Golden had deprived Petitioners of the opportunity to participate in Golden's special use permit procedure in violation of their right to procedural due process. The trial court determined that the addition would have been a permitted use had Hillside first obtained a special use permit. Pet. App. 37. It also determined that under the regulations governing special use permits, Petitioners would have been entitled to notice of and an opportunity to participate in a public hearing on any application for such a permit. Pet. App. 51. It concluded, therefore, that Petitioners' "procedural due process rights" were violated, directed Hillside to file an application for a special use permit, directed Golden to process the application, and awarded Petitioners attorneys' fees under 42 U.S.C. § 1988. Pet. App. 52-53. The Colorado Court of Appeals affirmed the trial court's judgment on the procedural due process claim. Pet. App. 27-28.

The Colorado Supreme Court granted certiorari solely as to the due process claim and reversed. Pet. App. 1-23. It reversed the judgment on two separate and independent grounds. First, it determined that Petitioners had no property interest in the special use procedures of the GMC or in the outcome of an application under such procedures. Pet. App. 3-4. Second, it determined that due process had been provided by the mandamus and injunction remedy. Pet. App. 4.

With respect to the issue of whether Petitioners had an interest protected by the Fourteenth Amendment, the court identified two possible property interests, the procedural rights granted to adjacent property owners under the special use regulations and an asserted entitlement to have any special use application denied. Following this Court's decision in *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983), it held that procedural rights, without more, do not create a constitutionally protected property interest. Pet. App. 10-14. As to Petitioners' asserted entitlement to a denial of any special use application, the court held that because of the broad discretion granted to the planning commission and city council under the Golden special use ordinance, Petitioners had no "claim of entitlement" to a denial. Pet. App. 14-19. Relying on this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), it concluded that, without a claim of entitlement to a denial, Petitioners could have no property interest protected by the Fourteenth Amendment. Pet. App. 19.

Based on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986), the Colorado Supreme Court also determined that, even assuming a property interest existed, any deprivation suffered by Petitioners did not take place without due process of law. Because the building permits had been issued as a result of an unanticipated mistake by the planning official and in violation of the governing ordinance, the city could not have anticipated the deprivation or conducted a pre-deprivation hearing. Pet. App. 20-21. Therefore, the post-deprivation remedies of mandamus and injunction satisfied the requirements of due process. Pet. App. 19-22.

While the case was on appeal, Petitioners twice moved to have Hillside and Golden found in contempt of the original judgment. Following trial, Hillside elected to seek a rezoning of its property rather than a special use permit. The trial court found Hillside and Golden in contempt of court for filing and processing the rezoning because a rezoning would moot the need for the special use permit and height variance the original judgment had directed Hillside to seek. That decision was reversed by the Colorado Court of Appeals. App. 1 through App. 5. After the contempt order was reversed, Hillside brought the property into compliance, and Golden issued a new certificate of occupancy. Petitioners then moved to have Golden found in contempt of the portion of the original order directing that no new certificate of occupancy be issued until the addition complied with applicable zoning regulations and the building code. The trial court determined that the addition was in compliance and, therefore, Golden was not in contempt. App. 6 through App. 8. That decision is on appeal before the Colorado Court of Appeals.

REASONS FOR DENYING THE PETITION

The Colorado Supreme Court's decision is squarely in accord with this Court's decisions in *Olim*, 461 U.S. 238, *Roth*, 408 U.S. 564, and *Parratt*, 451 U.S. 527. The holdings in those cases compel the conclusion that Petitioners have not established the elements of a procedural due process claim. To establish a violation of the right to procedural due process a plaintiff must prove: (1) the existence of a constitutionally protected interest in either life, liberty or property, (2) the deprivation of that interest from government action, and (3) that the deprivation

occurred without constitutionally adequate pre- or post-deprivation process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). None of the elements are present in this case.

Despite the fact that the other elements of a procedural due process claim are missing, Petitioners suggest this Court should grant certiorari in order to define a common standard for identifying property interests created by land use regulations in the due process context. While it may be true that some confusion exists among federal circuits and state courts as to the proper application in the land use context of the "legitimate claim of entitlement" test articulated by this Court in *Roth*, 408 U.S. 564, this case is not a proper vehicle to address those concerns. The Colorado Supreme Court interpreted the special use ordinance in question to provide the Golden Planning Commission and Golden City Council with "significant – if not unlimited – discretion" to approve or deny any application for a special use permit. Pet. App. 16. This Court is bound by the Colorado Supreme Court's construction of the ordinance. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Given that construction, Petitioners' rights would not constitute a property interest under the standards of any of the lower courts utilizing the *Roth* test to determine whether a property right exists in land use cases.

I. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS DIFFERING DEFINITIONS OF PROPERTY

Although Petitioners argue that this case presents a "perfect vehicle for the Court to determine what constitutes a property right," *see* Pet. 21, the Petition is

remarkably vague as to the precise property interest of Petitioners at issue. In essence, Petitioners claim that: (i) they have a property interest in restricting Hillside from using its property in certain ways; (ii) this property interest arises not from any common law property interest, such as might arise from a restrictive covenant or under nuisance law, but solely from applicable zoning regulations, and (iii) errors in administration of the zoning regulations deprived Petitioners of their interest without due process. The vast majority of the cases cited in the Petition address only the question of whether an applicant has a property interest in receiving a development permit for his property, not whether one opposing another landowner's application may have a property interest in denial of the application. Even if the courts do apply different standards to determine whether an applicant has a property interest in the requested permit, this case will not permit this Court to address the discrepancies, because it poses an entirely different question.

At different stages of the litigation, Petitioners have identified three different, but related, interests as the basis for their due process claim. The Complaint and Amended Complaint alleged a deprivation "of the right to participate in the Special Use Permit procedure," in other words, procedural rights. Record Vol. 1 at 4; Vol. 3 at 509. It is this interest which was considered by the trial court and court of appeals. The trial court held that Petitioners had a property interest in the procedures governing special use applications. Pet. App. 52. The Colorado Court of Appeals also ruled that Petitioners had been deprived of procedural rights.

> [T]he city *denied [Petitioners] the opportunity to testify at a special use permit hearing*. Therefore,

> the trial court properly found that [Petitioners'] procedural due process rights were violated, and they are *entitled to a hearing on the permit.*

Pet. App. 28 (emphasis added).

Before the Colorado Supreme Court, Petitioners identified their property interest as the right to a denial of any special use application by Hillside. Neither of the lower courts had ruled that Petitioners were entitled to a denial, and, indeed, such a holding would have been inconsistent with the order directing Hillside to file a special use application and Golden to conduct a hearing on the application. Pet. App. 53, 55. The Colorado Supreme Court determined that no property interest in a denial existed but described the court of appeals' ruling as finding Petitioners had such an interest. Pet. App. 9-10. Although not entirely clear, Petitioners now appear to be claiming a slightly different interest by arguing that Olson has suffered "deprivation related to the use and enjoyment of her property." Pet. 21. None of the identified interests constitutes a property interest protected by the Fourteenth Amendment.

A. Procedural Rights

Procedural rights are not constitutionally protected property rights. *Olim*, 461 U.S. at 250. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.*

Although *Olim* involved procedures governing transfer of a prisoner to another state, numerous lower courts have applied its holding in other contexts. In a takings case, the Sixth Circuit said: "What the Due Process

clauses of the Fifth and Fourteenth Amendments protects [sic] is 'life, liberty [and] property,' not the procedures designed to protect life, liberty, and property." *Montgomery v. Carter County*, 226 F.3d 758, 768 (6th Cir. 2000) (citations omitted). Finding no violation of due process in the failure of officials to properly follow state procedures in a collection case, the First Circuit stated: "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." *Slotnick v. Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). The Third Circuit found that the improper use in a lineup of a defendant's photograph in violation of state procedures governing the use of juvenile records did not violate the defendant's right to due process. *United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981), *cert. denied*, 455 U.S. 923 (1982). The Colorado Supreme Court applied the principle in a licensing proceeding. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 20 (Colo. 1993) ("fact that the General Assembly has created a right to such a hearing does not mean that plaintiffs are independently entitled to it as a matter of constitutional law").

Numerous courts have also applied the *Olim* holding with respect to land use procedures. *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994) ("[T]he Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution." (citations omitted)); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("A bad-faith violation of state law [requiring public notice before enactment of zoning ordinances] remains only a violation of state law."); *Fusco v. Connecticut*, 815

F.2d 201, 205-06 (2d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987) (no property interest in purely procedural rights); *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) ("The violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."); *Double I Ltd. P'ship v. Plan and Zoning Comm'n.*, 588 A.2d 624, 631 (Conn. 1991) (procedural guarantees of state law do not create property interest).

The Colorado Supreme Court's determination that procedural rights granted to Petitioners under the zoning regulations, without more, do not rise to the level of a constitutionally protected property interest is both faithful to this Court's decision in *Olim*, 461 U.S. 238, and consistent with the decisions of other courts which have considered the issue. Petitioners characterize this ruling as adopting a "minority view," *see* Pet. 7, but cite no case to contradict the numerous cases discussed above.

B. Entitlement to Denial of Special Use Application

This Court's statement that the "expectation of receiving process, without more," is not an interest protected by the Fourteenth Amendment, *see Olim*, 461 U.S. at 250 n.12, begs the question of what "more" is required to create a property interest. Petitioners, relying on *Roth*, 408 U.S. at 577, argue that it is a legitimate claim of entitlement to a denial of any application filed by Hillside arising from substantive criteria which limit the planning commission's discretion. In this case, their argument fails for two reasons. First, Petitioners have no legitimate claim of entitlement to a denial. Second, even if they did, the

Roth test, properly understood, should not apply to one opposing the grant of a government permit to another.

Petitioners claim to be entitled to a denial of any special use application based upon a section of the GMC which states that a special use permit shall be granted "only if the usage will not authorize or require any construction or alteration in violation of any ordinances of the city including the planning and zoning ordinance and the city building code." Pet. App. 61, GMC § 18.30.020(5). In construing the ordinance, however, the Colorado Supreme Court held that two other provisions, GMC § 18.30.020(7) and GMC § 18.30.040, controlled over GMC § 18.30.020(5), and provided both the Golden Planning Commission and Golden City Council "significant – if not unlimited – discretion" to approve or deny an application as each deemed appropriate even if the application did not satisfy the requirement of GMC § 18.30.020(5). Pet. App. 16-18. Therefore, the court held that Petitioners had no entitlement to a denial. *Id.*

In order to pursue their claim, Petitioners ask this Court to ignore the Colorado Supreme Court's construction of the ordinance. Pet. 20-21. This Court cannot do so. *R.A.V.*, 505 U.S. at 381 (state supreme court's construction of an ordinance is binding). This is true even if this Court would have construed the ordinance differently. *Id.* at 412 (White, J., concurring); *see also City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (no authority to construe statute more narrowly than state supreme court); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (no authority to place a construction on state statute different from that rendered by state supreme court). Because a special use permit can be approved or denied at the discretion of the planning commission, Petitioners have no legitimate claim of

entitlement under the *Roth* standard. *Roth*, 408 U.S. at 577.

Even if Petitioners could establish a mandatory duty on the part of the planning commission to deny a special use application, the *Roth* test should have no application to them. In a series of cases in the early 1970s, this Court determined that, under certain circumstances governmental benefits such as welfare benefits and government employment are property interests subject to the protection of the Due Process Clause of the Fourteenth Amendment. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Perry v. Sindermann*, 408 U.S. 593 (1972) (government employment); *Roth*, 408 U.S. 564 (government employment). Prior to those cases, government jobs and statutorily created benefits had been considered privileges, not property interests protected by the Due Process Clause. Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1974 (1996). Following those cases, such rights and benefits sometimes have been referred to as "new property." *See George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003). In *Roth*, this Court limited the scope of "new property" and held that a government employee had no property interest in continued employment as long as there was no "legitimate claim of entitlement." *Roth*, 408 U.S. at 577.

In applying the *Roth* test in other areas, this Court has limited it to interests having an ascertainable monetary value. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 964 (2000) ("The various interests recognized as property for procedural due process purposes nearly all have a monetary value."). Neither this Court nor any other has extended the *Roth*

test to find an interest in having another person's request for a governmental benefit denied. *See id.*

In the land use arena, federal circuits have frequently relied upon an absence of a "legitimate claim of entitlement" to dismiss procedural and substantive due process claims filed by unsuccessful applicants for a development permit. *See, e.g., Gardner v. City of Baltimore*, 969 F.2d 63, 71 (4th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *RRI Realty Corp. v. Inc. Village of Southhampton*, 870 F.2d 911, 918 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989). As long as the regulatory scheme confers any discretion on the local government as to whether to grant or deny a permit, an applicant has no legitimate claim of entitlement to the permit and, therefore, no property interest for due process purposes. *RRI Realty Corp.*, 870 F.2d at 918.

The clear entitlement test of *Roth* does not make sense when applied to someone opposing another person's application for a governmental benefit. If an application is granted, the applicant receives something from the government, namely a permit. If an application is denied, the opponent receives nothing. The Connecticut Supreme Court adopted this reasoning in *Double I Ltd.*, 588 A.2d 624, when it rejected a neighboring owner's due process challenge to the statutory framework governing the processing of special use applications because it required only notice by publication and not actual notice to adjacent landowners.

> In essence, the plaintiffs are claiming that they have a property interest in the procedures set forth in [the Connecticut statute] and that they were denied the right to avail themselves of these procedures because the statute did not

> require that they receive actual notice of the hearing.

Id. at 631. After first stating that mere procedural rights do not create a property right, the court then refused to apply the *Roth* test to adjacent landowners opposing issuance of a permit. *Id.* at 630-31. The court noted that even if the statute includes substantive criteria that limit the discretion of the decision-making body, "a party whose asserted property interest is not related to the substantive criteria but rather is grounded solely in the procedures set forth in the statute does not have a constitutionally cognizable property interest." *Id.* at 631. It reiterated this holding in *Grimes v. Conservation Comm'n of the Town of Litchfield*, 703 A.2d 101, 104-105 (Conn. 1997), once again emphasizing that substantive criteria mandating a denial of an application do not create a property interest in such denial for adjacent landowners.

The Second Circuit, in *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994), also expressed doubt that a property owner "ever could have a protected interest in the enforcement of the zoning laws against an adjoining property" because generalized benefits conferred by statute are not a property interest protected by the Due Process Clause. *Id.* It did not need to rule on the issue because it found that, even if *Roth* applied, the adjoining landowners had not established a clear entitlement to the desired enforcement action. *Id.*

In *Woodward & Lothrop, Inc. v. Neall*, 813 F. Supp. 1158, 1160 (D. Md. 1993), the court stated that the law was well settled that one does not have a property interest in another owner's land use even if that use may adversely affect the market value of one's property. Therefore, the

court held that the *Roth* test had no relevance to one claiming a protected interest in enforcement of regulations against another landowner. *Id.*

No court has actually applied the *Roth* test and found that a party had a property interest in denial of an abutting landowner's development application, although both the Colorado Supreme Court and the Tenth Circuit in footnotes have suggested that such a property interest could arise if the decision-making body's discretion was sufficiently restricted. *See* Pet. App. 15 n.6; *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 n.4 (10th Cir. 2003).

The other cases cited by Petitioners in support of their argument do not involve the *Roth* test. In *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001), the Sixth Circuit affirmed the dismissal of the adjacent landowners' procedural and substantive due process claims on various grounds without discussion of whether plaintiffs had a property interest. In *DuLaney v. Okla. State Dep't of Health*, 868 P.2d 676 (Okla. 1994), the court held that adjacent landowners were entitled to notice and an opportunity to be heard before a state agency issued a permit to operate a solid waste disposal site. Once again, there is no discussion of the *Roth* test or whether the plaintiffs would be entitled to a denial of any permit. *Id.* In distinguishing the decision from those of other courts which have held there is no property interest in another owner's land use, the Oklahoma Supreme Court based its decision upon the unique threats posed to adjacent landowners by a landfill. *Id.* at 682 (qualitative difference between homeless shelter and landfill because contaminants from landfill could permanently damage adjacent properties).

In the context in which it arose, the *Roth* test necessarily only applied to an applicant for, or recipient of, a governmental benefit. *Roth*, 408 U.S. 564. No one would seriously suggest that another applicant for Roth's job might have had a property interest in the termination of Roth's employment. Similarly, in *Goldberg*, 397 U.S. 254, a taxpayer would have no property right in the denial of welfare benefits to a non-qualifying recipient. No good reason exists to extend the *Roth* test to non-applicants in the land use context.

The reasoning of the Second Circuit and the Connecticut Supreme Court is more sound than the footnoted dicta of the Tenth Circuit and the Colorado Supreme Court. A denial of someone else's application for a special use permit has none of the features of a property right. It depends for its very existence upon another party filing an application which fails to comply with the applicable criteria. It ceases to exist if the application is amended to comply, if the criteria are amended, or even if the application is withdrawn. If the government denies the application, the opponent receives nothing. If the application is granted, the opponent's use of her property is unaffected, and no property is taken from the opponent. In some instances, the opponent arguably suffers some diminution in property value. As discussed in the next section, however, the Due Process Clause has never been held to protect a property owner from government action which might cause a diminution in property value.

C. Use and Enjoyment of Property

The Petition states that Hillside's expansion caused Olson to suffer a deprivation "related to her use and

enjoyment of her property."[1] Pet. 21. It is undoubtedly true that Olson's ownership interest in her residence is a property interest protected by the Due Process Clause. It is also true, however, that her property interest does not include the right to restrict Hillside's use of its property except to the extent the use constitutes a nuisance or is prohibited by a restrictive covenant. *See* 1 Kenneth H. Young, *Anderson's American Law of Zoning* §§ 3.03, 3.04 (4th Ed. 1995). Petitioners did not claim the existence of any restrictive covenant or nuisance. *See* Pet. App. 34-59. In effect, then, Petitioners are claiming that the zoning regulations grant them a property interest in restricting Hillside's uses similar in nature to a restrictive covenant, and any failure by the government to enforce or correctly administer such regulations deprives them of their property interest.

This Court previously rejected a similar contention while discussing a hypothetical situation. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999).

> [N]ot everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests. A municipal ordinance prohibiting billboards in residential areas protects the property interests of homeowners, although erecting billboards would ordinarily not deprive them of property. To sweep within the Fourteenth Amendment the elusive property interests that are "by definition"

[1] The Petition is not clear as to whether this particular assertion applies to both Petitioners.

> protected by . . . law would violate our frequent admonition that the Due Process Clause is not merely a "font of tort law."

Id. (emphasis in original). As this Court's billboard hypothetical makes clear, just because a law is designed to protect property values, property owners do not have a property interest in the law itself or its enforcement against other property owners.

Since its earliest cases considering zoning matters, this Court has held that a zoning regulation that causes a substantial diminution in property value does not implicate the Due Process Clause. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). If that is true with respect to a zoning regulation as applied to the plaintiff's own property, it also must be true with respect to zoning regulations as applied to another's property. *See, e.g., Fusco*, 815 F.2d at 206 (decline in property value as result of land use decision with respect to adjacent land not cognizable under Fourteenth Amendment); *Dale v. Town of Elsmore*, 702 A.2d 1219, 1224-25 (Del. 1997) (Due Process Clause does not protect against arbitrary and irrational decision to approve loading zone for adjacent commercial property). In this case, state law provided protection to Petitioners, but that state law did not rise to the level of a property interest. *See, e.g., River Park, Inc.*, 23 F.3d at 166-67 ("Failure to implement state law violates that state law, not the Constitution." (citations omitted)).

The fact that the illegal structure in this case is one that could have been allowed upon approval of a special use application following a public hearing in which Petitioners would have been entitled to participate does not put the Petitioners in a better position than the adjacent landowners complaining of the hypothetical billboard in

College Sav. Bank, 527 U.S. at 674. Whether a use is always prohibited in a zone district or only prohibited if no special use permit has been granted following a hearing, adjacent landowners have only the remedies granted by state law, not a constitutionally protected property interest in enforcement of the prohibition. *See id.*

II. THE OTHER ELEMENTS OF A DUE PROCESS CLAIM ARE MISSING

Even if Petitioners had a property interest in the special use procedures or an entitlement to a denial, the Colorado Supreme Court's decision is correct because the other elements necessary to establish a procedural due process claim are absent.

A. No Deprivation

Petitioners were not deprived of any rights related to a special use permit because Hillside never applied for a special use permit and Golden never issued one. The original judgment in favor of Petitioners was based upon the unstated premise that issuing the building permits was the equivalent of issuing a special use permit.

The unstated premise is wrong. Because Hillside had more than one option available to it under the GMC to obtain approval of the proposed addition, a special use permit was not a necessary prerequisite to obtaining a validly issued building permit for the addition. If the official had not made a mistake when Hillside applied for the building permits, the proper course of action would have been to simply deny the requested building permit. Pet. App. 60, GMC § 18.08.030. As the post-trial history of this case demonstrates, Hillside could then have met the

requirements for obtaining a building permit for the proposed addition either by requesting a special use permit or requesting a rezoning of its property. *See* App. 1-5.

Issuing the building permits for a nonconforming structure violated GMC § 18.08.030. It did not violate the provisions governing special use permits or rezonings. The violation of GMC § 18.08.030 did not implicate any procedural rights of the Petitioners, other than their right to sue for mandamus to correct the mistake under GMC § 18.08.050. They were not deprived of that right. The Due Process Clause does not guarantee a landowner that a building permit will not be issued by mistake to an adjoining landowner. *See College Sav. Bank*, 527 U.S. at 674 (violation of regulation designed to protect property values does not deprive a landowner of property interest); *Gagliardi*, 18 F.3d at 192 (no protected interest in enforcement of zoning regulations against another property owner).

B. No Absence of Due Process

The Fourteenth Amendment does not protect against all deprivations of life, liberty or property, but only those which occur without due process of law. *Parratt*, 451 U.S. at 537. In most cases, due process requires a hearing prior to the time a state interferes with a property interest. *Id.* When, however, the deprivation is caused not as a result of the established state procedure, but by an unauthorized failure of officials to follow the procedure, then due process is satisfied if the state provides an adequate post-deprivation remedy. *Id.* at 542. In *Parratt*, a prisoner lost a mail-ordered hobby kit when officials failed to follow

established state procedures. Because the State of Nebraska provided a remedy for persons who had suffered loss or damage to property as a result of state action, there was no violation of the prisoner's right to due process. *Id.* at 543-544. This was true even though the state procedure did not provide for all of the remedies that would have been available under 42 U.S.C. § 1983. *Id.* at 544.

In this case, the lower courts ruled that Petitioners suffered a deprivation of the right granted to them to participate in a public hearing on the special use application. That deprivation was the result not of Golden's policy, which, in fact, required a hearing before a special use permit was granted and prohibited officials from issuing a building permit for a structure which did not comply with zoning regulations, but rather of an unanticipated failure of the planning official to follow the policy. GMC § 18.08.050 provided, and Petitioners successfully utilized, a remedy to correct this error. Because the deprivation resulted from a random and unauthorized act and the Petitioners had an adequate post-deprivation remedy, they were not deprived of their due process rights. *See Parratt*, 451 U.S. at 542. The same result obtains whether the violation of GMC § 18.30.030 was negligent or deliberate. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

> *Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.

Zinernon v. Burch, 494 U.S. 113, 128 (1990). Due process requires only a post-deprivation remedy because it is impossible for the state to anticipate when an official will

negligently or intentionally deprive someone of property. *Id.* at 129-30. Similarly, it is impossible to predict when an official will issue a building permit based upon a mistaken interpretation of the applicable ordinances and, by so doing, deprive someone of the right to a public hearing.

A number of courts have applied the *Parratt* rule in the land use context. *Herwins v. City of Revere*, 163 F.3d 15, 19 (1st Cir. 1998) (wrongful closure of building without prior hearing by health inspector); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988) (availability of state court review of zoning commission precluded procedural due process claim); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479-81 (7th Cir. 1990) (unauthorized denial of building permit did not violate the applicant's due process rights as long as the remedy of mandamus is available); *Rivkin v. Dover Township Rent Leveling Bd.*, 671 A.2d 567, 577-81 (N.J. 1996) ("flawed hearing" as result of biased member of rent leveling board not a violation of due process where state policy mandated recusal and post-deprivation remedy of judicial review existed).

Petitioners argue that the deprivation in this case resulted from official policy, not a violation of such policy, and, therefore, only a pre-deprivation hearing could satisfy due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 435-36. The Colorado Supreme Court found no support for this argument in the record. Pet. App. 20-21. In response to the court's statement, Petitioners suggest, that because the court found no deprivation of due process, it had no basis for determining the adequacy of the remedy for any such deprivation. Pet. 21. In an eight-day trial, Petitioners had ample opportunity to present evidence as to the precise deprivation they allegedly suffered. The

Colorado Supreme Court reviewed that evidence and determined the deprivations were not the result of official policy. Just because the court also concluded that the interests in question were not property does not mean that it cannot determine whether the deprivation of those interests resulted from error or official policy. Petitioners' argument that the court cannot rule on alternative grounds does not merit serious attention.

The Petitioners had an adequate post-deprivation remedy which they successfully utilized. Even if their right to participate in the public hearing is a constitutionally protected right, the post-deprivation remedy satisfied the requirement of due process. *See Parratt*, 451 U.S. at 543-544.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No. 01CA0068
Jefferson County District Court No. 98CV1842
Honorable Kenneth E. Barnhill, Jr., Judge

Marian L. Olson and Ida Mae Brueske,

Plaintiffs-Appellees,

v.

Hillside Community Church, S.B.C.; the City of Golden; and the City Council of the City of Golden,

Defendants-Appellants.

ORDER REVERSED

Division V
Opinion by JUDGE VOGT
Kapelke and Casebolt, JJ., concur

NOT SELECTED FOR PUBLICATION
October 18, 2001

Victor F. Boog & Associates, P.C., Victor F. Boog, Linda A. Battalora, Lakewood, Colorado, for Plaintiffs-Appellees

Holley, Albertson & Polk, P.C., Dennis B. Polk, Golden, Colorado, for Defendant-Appellant Hillside Community Church, S.B.C.

Griffiths, Tanoue, Light, Harrington & Dawes, P.C., Steven J. Dawes, Denver, Colorado, for the City of Golden and the City Council of the City of Golden

Defendants, Hillside Community Church, S.B.C., the City Of Golden, and its City Council, appeal a trial court order holding them in contempt and enjoining further proceedings on Hillside's rezoning application. We reverse.

The order at issue here was entered based on the trial court's determination that defendants had failed to do what the court had previously ordered as part of the final judgment in an action brought against them by plaintiffs, Marian L. Olson and Ida Mae Brueske. As relevant here, that judgment ordered the City to vacate the certificate of occupancy it had issued for Hillside's newly-constructed addition and directed that no new certificate of occupancy be granted absent approval of a special use permit issued in compliance with the City's municipal and building codes. The judgment further required that Hillside apply for a special use permit and request a hearing on its application, and that the City conduct such a hearing.

On appeal, a division of this court affirmed the portions of the judgment at issue here, agreeing with the trial court that the City's failure to require Hillside to obtain a special use permit violated plaintiffs' due process rights to testify at a special use permit hearing. *See Olson v. Hillside Community Church*, ___ P.3d ___ (Colo. App. No. 99CA2070, Sept. 13, 2001).

After entry of the judgment, Hillside did not apply for a special use permit but, instead, filed an application seeking rezoning as a planned unit development. Plaintiffs then sought and obtained an order directing defendants to show cause why they should not be held in contempt for disobeying the trial court's orders in its prior judgment.

Before the show cause hearing was held, the City's planning commission held hearings on Hillside's rezoning

application and recommended that the City Council approve it.

At the conclusion of the show cause hearing, the trial court found that defendants had intentionally failed to comply with its prior judgment. Granting the remedy sought by plaintiffs for defendants' contempt, the court enjoined defendants from proceeding with Hillside's rezoning application.

On appeal, defendants contend that the trial court erred in finding them in contempt and enjoining further proceedings on the rezoning application. We agree.

A trial court has the power and the duty to enforce its own orders. *See In re Estate of Elliott*, 993 P.2d 474 (Colo. 2000). A court may enter a finding of civil contempt for refusal to obey a court order if it finds that a party who has a duty to obey the order and a present ability to obey it has refused to perform the act required. *People v. Lockhart*, 699 P.2d 1332 (Colo. 1985).

However, a party may be held in contempt only for refusal to do what the court order specifically requires. A party may not be held in contempt for refusal to do that which the court has not ordered it to do. *People v. Lockhart, supra*; *see also Eatchel v. Lanphere*, 170 Colo. 545, 463 P.2d 457 (1970) (reversing contempt judgment where there was insufficient evidence that respondents were under an obligation to proceed as trial court directed); *McMullin v. City & County of Denver*, 125 Colo. 231, 242 P.2d 240 (1952) (city could not be held in contempt where decree of court did not require it to do or refrain from doing anything); *In re Marriage of Zebedee*, 778 P.2d 694 (Colo. App. 1988) (reversing finding of contempt where husband's actions did not violate any court order).

Here, the judgment that defendants were found to have violated did not preclude Hillside from filing, or the City from processing, an application for rezoning as a planned unit development. Although the judgment ordered Hillside to apply for a special use permit and the City to conduct a hearing on such application, it did not specify a time frame for the accomplishment of these objectives. Thus, while the trial court understandably could have perceived defendants' actions as intended to circumvent the previous judgment, those actions did not amount to a violation of any specific prohibitory or mandatory provisions of that judgment.

We also note that, as recognized by the division in the first appeal, a primary purpose of the previous judgment was to give plaintiffs the opportunity to be heard. The record indicates that plaintiffs were afforded such opportunity in hearings on Hillside's rezoning application.

Finally, if the rezoning application were to be granted, plaintiffs would not be left without a remedy, but would be able to challenge that determination in a proceeding under C.R.C.P. 106(a)(4). *See Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975), *overruled in part by Margolis v. District Court*, 638 P.2d 297 (Colo. 1981).

Because the evidence did not establish that defendants violated the trial court's prior judgment, the finding of contempt based on such asserted violation is not sustainable. See *In re Marriage of Zebedee*, *supra*. It follows that the injunction entered as a remedy for the contempt must likewise be set aside.

In light of our resolution of this issue, we need not address defendants' additional contentions on appeal.

The order is reversed.

JUDGE KAPELKE and JUDGE CASEBOLT concur.

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	COURT USE ONLY
Plaintiffs: MARIAN L. OLSON and IDA MAE BRUESKE Defendants: HILLSIDE COMMUNITY CHURCH, S.B.C., a Colorado non-profit corporation; COLORADO BAPTIST GENERAL CONVENTION, a Colorado non-profit corporation; THOMAS K. MURPHY, DOUGLAS KINNER; FIRST BANK OF ARVADA, N.A.; THE PUBLIC TRUSTEE OF JEFFERSON COUNTY, COLORADO; and THE CITY OF GOLDEN, Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN	Case Number 98-CV-1842 Division 2
ORDER	

THIS MATTER having come before the Court for hearing on the Order to Show Cause issued December 27, 2001, and

THE COURT having heard testimony and the arguments of counsel on March 4th and 14th, 2002 and the Court otherwise being fully advised in the premises, it is

HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants The City of Golden and The Council of The City of Golden have shown cause why they should not be held in contempt for disobeying the Order of Senior District Judge Kenneth E. Barnhill dated October 6, 1999, and, therefore, the Order to Show Cause dated December 27, 2001 is discharged.

BY THE COURT:

_____

District Court Judge
March 26, 2002
Stephen M. Munsinger

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	
Plaintiffs: MARIAN L. OLSON and IDA MAE BRUESKE Defendants: HILLSIDE COMMUNITY CHURCH, S.B.C., et al.	COURT USE ONLY
THE OVERTON LAW FIRM Thomas J. Overton, 12459 1080 Kalamath Denver, CO 80204 Telephone: (303) 832-1120 Attorneys for Hillside Community Church, S.B.C.	Case Number 98-CV-1842 Division 2
CERTIFICATE OF MAILING RE:	

ORDER DATED MARCH 26, 2002

I hereby certify that on the 26th day of March, 2002, I sent a true and correct copy of the foregoing Order to:

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Respectfully submitted this 26th day of March, 2002.

THE OVERTON LAW FIRM
By: Thomas J. Overton

Supreme Court, U.S.
FILED
APR 30
OFFICE OF THE CLERK

No. 02-1373

In The
Supreme Court of the United States

MARIAN L. OLSON and IDA MAE BRUESKE,

Petitioners,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. RESPONDENTS DO NOT REFUTE PETITIONERS' ESSENTIAL ARGUMENTS FOR GRANTING THE WRIT OF CERTIORARI

The Petitioners (collectively referred to as "Olson") request review by this Court because their due process claim involves an important federal matter, because there are deep divisions among federal circuit courts and state supreme courts, and because opinions by this Court do not provide adequate guidance. In their *Brief in Opposition*, Respondents (collectively referred to as the "City of Golden") do not refute ***any*** of these reasons for granting the *Petition for Writ of Certiorari* (the "*Petition*").

Olson's claim to a property interest is an important matter because due process acts as the irreducible minimum of government protection that must be afforded life, liberty, and property. It establishes a floor, below which government – state and federal – cannot sink.

Here, the Colorado Supreme Court looked at a property regulatory scheme that gave Olson a certain degree of protection to her home and the use and enjoyment of it. In the words of the City of Golden: "In effect, Petitioners are claiming that the zoning regulations grant them a property interest in restricting Hillside's uses similar in nature to a restrictive covenant." *Opp. Brief* at 17. Olson basically agrees with this characterization. Olson has a right to due process because the City of Golden's land use regulations give her a legitimate claim of entitlement, and the City of Golden, and then the Colorado Supreme Court, violated Olson's due process rights when they refused to recognize

that Olson had a property right deserving of Fourteenth Amendment protection.[1]

The City of Golden concedes – indeed even identifies – fundamental splits that must necessarily be resolved if this Court grants the *Petition*. It urges (in an argument more properly addressed at the merits stage) that land use regulation should ***never*** give rise to a property right because such regulation involves only "procedure," relying upon *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983). *See Opp. Brief* at 4. As discussed below, the City of Golden also identifies other courts that have disagreed with this view, finding the existence of property rights subject to protection under the Due Process Clause in the land use context. Olson here identifies two existing legal theories that provide her with property rights protected by the Due Process Clause: Olson had a property right because the decisions by the City of Golden fundamentally impacted the home she owned, or Olson had a legitimate claim of entitlement under the applicable regulatory scheme.

The City of Golden cannot point to any clear guidance from this Court that resolves Olson's claim to a property right. On the contrary, the City of Golden draws arguments from different opinions decided by this Court, all in an effort to show that Olson in fact did not have a property interest. But there is no consistency or coherency to the arguments. For example:

---

[1] As noted in the *Petition*, the trial court found that Olson had a property right, and the Colorado Court of Appeals affirmed the existence of that property right. The Colorado Supreme Court then reversed the Court of Appeals and held that Olson did not have a property right under the applicable City of Golden ordinances.

a. Olson has no rights as a neighboring landowner. *Opp. Brief* at 7, 14-15.

b. Olson's rights are only "procedural." *Opp. Brief* at 8-10.

c. The legitimate-claim-of-entitlement test under *Board of Regents v. Roth*, 408 U.S. 564 (1972) should not even apply in the land use context. *Opp. Brief* at 10-14. *See especially id.* at 12 ("Even if Petitioners could establish a mandatory duty on the part of the planning commission to deny a special use application, the *Roth* test should have no application to them."). Indeed, the City of Golden asserts that courts recognizing such use of the *Roth* test are wrong. *Opp. Brief* at 16 ("The reasoning of the Second Circuit and the Connecticut Supreme Court is more sound than the footnoted dicta of the Tenth Circuit and the Colorado Supreme Court.").

d. Relatedly, the *Roth* test should be limited to those situations where the deprivation involves "an ascertainable monetary value." *Opp. Brief* at 12.

e. The deprivation Olson was subjected to is analogous to placing a billboard in someone's neighborhood which does not give rise to a due process violation. *Opp. Brief* at 17-18.[2]

---

[2] This point, purportedly supported by *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 674 (1999), is inapposite. The quote offered by the City of Golden assumes that a property right already exists, and that case is more appropriately characterized as involving diminution in value which is very different than this case, which is centered on determining whether there is a property right in the first instance warranting due process protection.

In short, this case cleanly poses the basic question of whether there is even a property right in the first instance that would warrant due process protection. Not once do respondents ever rebut this fundamental point; indeed, they proffer numerous arguments – all proper at the merits stage – why Olson does not have a property right warranting due process protection. A careful review of the *Brief in Opposition* offers affirmative support for Olson's argument that this Court should grant the *Petition*.

II. THE *PETITION* AFFORDS THIS COURT AN IDEAL OPPORTUNITY TO RESOLVE DIFFERENCES AMONG CIRCUIT COURTS

Not only does the *Brief in Opposition* fail to rebut Olson's arguments, but it offers further evidence that this Court should grant the *Petition*. In defending the decision of the Colorado Supreme Court, the *Brief in Opposition* shows the difficulty in defining a due process property interest by relying on existing Supreme Court case law. Both the City of Golden and Olson have identified confusion among the courts over the meaning of a due process property interest applied to governmental land use decisions, and the *Brief in Opposition* provides several examples of this confusion and disagreement among the courts.

This *Petition* presents a clear opportunity to resolve this discord. Olson has framed the issues appropriately, so that this Court may adopt one of three general standards used by the lower courts. Likewise, this case enables the Court to give meaning to the legitimate-claim-of-entitlement test in the land use context. Finally, much of the *Brief in Opposition* either discusses other elements of Olson's due process claim that go to the merits or that are

best resolved by the Colorado Supreme Court after this Court has defined a property interest and remanded this case. In any event, the City of Golden does little more than provide additional reasons why certiorari review is warranted.

A. Courts below Remain Deeply Divided over the Meaning of a Property Interest under the Due Process Clause in Land Use Decisions.

The *Brief in Opposition* strongly supports Olson's central point; that courts are deeply divided over the meaning of a property interest under the due process clause. In general, the *Brief in Opposition* argues the merits of Olson's claim to a property interest. By doing so, the City of Golden attempts to dissuade this Court from granting the *Petition* by arguing that Olson will lose on the merits. But by arguing the merits, the *Brief in Opposition* provides several examples of confusion and disagreement in the courts below.

First, the City of Golden highlights several conflicting tests that may be applied to determine a property interest in the land use context. The City of Golden relies on *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) to argue that zoning and land use decisions cannot implicate a property interest, because zoning decisions are only procedural in character. *Opp. Brief* at 8-10. It cites several federal courts that have followed this approach, including *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-167 (7th Cir. 1994), *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992), and *Fusco v. Connecticut*, 815 F.2d 201, 205-206 (2d Cir. 1987).

Yet the *Brief in Opposition* also recognizes that many federal appellate courts will find a property interest in land use decisions if one can show a legitimate-claim-of-entitlement, a test that arises from this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972). As evidence, it cites the following cases: *Gardner v. City of Baltimore*, 969 F.2d 63, 71 (4th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); and *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989). *Opp. Brief* at 13.

The *Brief in Opposition* contradicts itself yet a third time, claiming that in fact land use regulations cannot implicate a property interest. As support, it relies on *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 674 (1999). But the hypothetical question posed by that opinion dealt with the common law tort of unfair-competition, which has little to do with land ownership or governmental regulation. Furthermore, the application of *College Savings Bank* to the questions at hand is obscure at best, and has eluded both the Colorado Supreme Court in this case, as well as federal circuit courts on this issue. *See, e.g., George Washington University v. District of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003).

Second, the City of Golden makes clear that existing case law from this Court provides little guidance as to the meaning of a property interest in the land use context. For example, the *Brief in Opposition* attempts to draw salient analogies to the case at hand by comparing it to the evolution of a property interest in employment law. *Opp. Brief* at 12. In another instance, the City of Golden argues that *Roth* only applies to items of monetary value, *Opp. Brief* at 12, and later cites *Village of*

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), for its claims that a "diminution in monetary value does not implicate the Due Process Clause," *Opp. Brief* at 18. At one point, the City of Golden agrees with Olson that the Colorado Supreme Court improperly applied the legitimate-claim-of-entitlement test to this case, stating that the clear entitlement test "doesn't make sense" in this particular context. *Opp. Brief* at 13-14. Likewise, the City of Golden argues that "[n]o good reason exists to extend the *Roth* test to non-applicants in the land use context," *Opp. Brief* at 16, but it cites no authority for that statement. The City of Golden's failure to find some definitive guidance from this Court again underscores why certiorari review is appropriate.

Third, the City of Golden concedes that there is considerable disagreement among those courts that find a property interest if one can show a legitimate claim of entitlement. *Opp. Brief* at 6. The City of Golden concedes there is a division between the Second Circuit and the Connecticut Supreme Court on one hand, and the Tenth Circuit and the Colorado Supreme Court on the other. *Opp. Brief* at 16. Indeed, the *Brief in Opposition* describes the real legal disagreements among courts even when those courts agree that land use decisions can give rise to a property right if the claimant can establish a legitimate claim of entitlement. At the very least, this admitted disagreement shows why certiorari review is warranted.

B. The Issues Before this Court Are Framed Appropriately.

Although the City of Golden has submitted three Questions Presented in opposition to Olson's issues, the

issues presented by them are not properly before this Court. A respondent may respond to the questions presented by a petitioner only if there is "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court . . . " Sup. Ct. R. 15(2). Here, the City of Golden has not identified any misstatement of fact or law in the *Petition* that bears on the issues before this Court, and it has merely tried to reframe the issues in an argumentative manner in its favor. Accordingly, Olson has properly framed the issues for this Court.

C. This Court May Grant Relief to Petitioners.

In the *Petition*, Olson has demonstrated for this Court that federal circuit courts and state supreme courts employ essentially three different approaches with respect to a property interest: the first approach rejects the principle that a property owner has a property right in the land use context. The second approach assumes that ownership of property alone gives rise to a property right for due process purposes. The third approach finds a property interest if one can show a legitimate claim of entitlement under the regulatory scheme at issue.

This Court can award Olson relief by adopting the second approach, used by the Third Circuit in *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), *cert. denied*, 516 U.S. 937 (1995), *rev'd on other grounds sub nom. United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 398-402 (3d Cir. 2003), by the Delaware Supreme Court in *Dale v. Town of Elsmere*, 702 A.2d 1219, 1225 (Del. 1997) and by the Oklahoma Supreme Court in *DuLaney v. Oklahoma State Department of Health*, 868

P.2d 676, 678 (Okla. 1994). This Court may also grant Olson relief if it adopts the third approach, which finds a property interest only if one shows a legitimate claim of entitlement, because the current *Petition* certainly allows this Court to review the City of Golden's ordinances and hold that Olson had a legitimate claim of entitlement under that land use scheme.

D. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) Does Not Preclude Relief for Olson.

Although the Court will defer to a state court's construction of a state law or ordinance, "once any ambiguities as to the meaning of the statute are resolved, [this Court may] form [its] own judgment as to its operative effect." *Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993). Here, there was no dispute over the specific meaning of the Golden Municipal Code. Rather, Olson and the City of Golden disagreed over its operative effect, and the Colorado Supreme Court sided with the City of Golden, finding that the Golden Municipal Code operated to create no legitimate claim of entitlement. This interpretation does not bind this Court, and the City of Golden's reliance on *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) is misplaced. Although this Court may give careful consideration to the Colorado Supreme Court's views as to the "purpose, scope and operative effect" of the Golden Municipal Code, *Reitman v. Mulkey*, 387 U.S. 369, 373-374 (1967), this Court can and should reverse the Colorado Supreme Court when the City of Golden's ordinances at issue so clearly give Olson a legitimate claim of entitlement to prohibit the offending land uses adjacent to her property.

E. Much of the *Brief in Opposition* Is Irrelevant to the Issues Before this Court.

Starting on page nineteen of the *Brief in Opposition*, the City of Golden argues that even if Olson shows a property interest, her due process claim nonetheless fails. This issue is not before the Court. Olson has not asked this Court to evaluate other elements of her due process claim, nor has she asked this Court to define the proper remedy for the due process violation at issue. Rather, Olson simply asks this Court to determine whether she has a property right in the first instance. Olson understands that she may be required to appear again before the Colorado Supreme Court to argue what process is due once this Court has determined that she has a property right deserving of Fourteenth Amendment protection.

CONCLUSION

This Court should grant the *Petition*.

Respectfully submitted,

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